No. _____

IN THE

ORIGINAL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LACEY M. SIVAK,
Petitioner,

vs.

STATE OF IDAHO,
Respondent.

83-6326

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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QUESTIONS PRESENTED

1. Can a sentencing judge impose a death sentence based on factual findings contrary to those made by the jury in its verdict on guilt?

2. Can a sentencing judge in a capital case receive and consider unsworn, self-serving, extrajudicial statements by a non-testifying co-defendant, and use such statements as the basis for critical factual findings in imposing a sentence of death?

3. Can a capital defendant be denied the right to a trial by jury on the aggravating facts prerequisite to the imposition of a sentence of death, where those facts involve the acts and mental state involved in the commission of the crime?

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Lacey M. Sivak, Petitioner, respectfully prays that a Writ of Certiorari issue to review the opinion and order of the Supreme Court of the State of Idaho which affirms his penalty of death.

OPINIONS BELOW

The opinion of the Idaho Supreme Court affirming the Petitioner's death sentence, the dissenting opinions thereto, the Court's order denying a petition for rehearing and the dissent to the denial, and the Court's remittitur are set fourth in Appendix A. pp. 1-52. These opinions have not as yet been printed in the oficial reports.

JURISDICTION

The opinion of the Supreme Court of Idaho was filed on August 15, 1983, App. A, pp. 1-46. Rehearing was denied on December 27, 1983. App. A, p. 47. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Certificate of Mailing of Counsel of Record is forwarded to the Court under separate cover.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Idaho's statutory capital punishment scheme, which provides in pertinent part that the death penalty decision shall be reached by the court rather than by the jury. These include I.C. §§19-2515, 19-2827, 18-4001, 18-4002 and 18-4003. These provisions are lengthy and are therefore included in Appendix E.

STATEMENT OF THE CASE

Petitioner and his co-defendant Randall Bainbridge were accused of a gas station robbery in which a clerk was killed. The co-defendant disqualified the trial judge and his case was severed from Petitioner's and assigned to a separate judge. At Petitioner's trial the jury was instructed that under the State's Amended Information it might find Petitioner guilty of first degree murder either by premeditation or on a felony murder theory, or in both these ways. The jury, however, found Petitioner not guilty of murder by premeditation, but convicted him on the felony murder count. The jury also convicted Petitioner of robbery and of use of a firearm. The State's Information, the court's Instructions, and the jury's verdicts are all discussed at length elsewhere in this Petition.

Following return of these verdicts Petitioner demanded jury trial of aggravating circumstances but the court discharged the jury permanently. Appendix C, p. 18. Idaho statutes and case law do not provide for jury sentencing or jury participation in fact-findng at the capital sentencing trial. See, I.C. §19-2515, Appendix E, p. 1; State v. Creech, 670 P.2d 463 (Id. 1993).

After a sentencing hearing the trial judge issued from chambers his Report on Imposition of the Death Penalty, App. B, pp. 1-8, a Judgment of Conviction ordering that Petitioner be put to death, and a death warrant. Because this sentence was imposed in the Petitioner's absence the Idaho Supreme Court later ordered a resentencing, App. B, p. 11. The resentencing occured some sixteen months after the original sentence. The

trial judge nonetheless refused to hear evidence in mitigation, and issued a Report on Imposition of the Death Penalty which was identical to the first. App. B, pp. 21-28.

In setting the penalty at death the trial judge made direct findings, beyond a reasonable doubt, that clearly reflected his conclusion that Petitioner had premeditated the murder in direct contravention to the jury's acquittal on this count. These findings (that Petitioner killed the victim to prevent her acting as a witness to the crime and was "cool and collected" in doing so) are discussed in more detail elsewhere in this Petition.

On direct appeal the Idaho supreme court affirmed. It reiterated its position, reached earlier in State v. Creech, supra, that the federal Constitution does not guarantee jury participation in capital sentencings. (App. A, pp. 3-7). On that appeal Petitioner also contended that the inconsistency between his acquittal by the jury of premeditated murder on the one hand, and the sentencing court's findings on the other violated federal constitutional rights found in the Sixth, Eighth and Fourteenth Amendments. The Idaho supreme court rejected these contentions, suggesting that the sentencing judge's findings were not inconsistent with the jury's verdict, but were rather based on information not available to the jury. (App. A, pp. 12-13).

In so ruling the Idaho Supreme Court was able to point to only one bit of evidence which supported the judge's contradictory findings, but which was not seen by the jury: the self-serving, unsworn, uncross-examinated

statement given by Petitioner's co-defendant Randall Bainbridge. This statement, given pursuant to interrogation shortly after the co-defendant's arrest places primary responsibility for the crime on Petitioner. (App. D, pp. 1-75). The co-defendant was not cross-examined by Petitioner. The sentencing court at no time observed actual testimony given by the co-defendant. The statement was included among the police reports in the presentence report prepared for Petitioner's sentencing.

Petitioner did not object at sentencing to inclusion of the co-defendant's statement in the presentence investigation report. Under Idaho law a failure to object does not waive errors in capital cases. State v. Osborn, 102 Idaho 405, 410, 631 P.2d at 193 (1981). On direct appeal to the Idaho supreme court Petitioner complained that the sentencing judge's hearing procedure had failed to put him on notice of the issues and evidence to be considered at sentencing, and that the valid admissible evidence adduced at hearing failed to support the sentencing judge's conclusion that Petitioner was primarily responsible for the murder and that he rationally and cooly planned its commission. As noted above, the Idaho supreme court ruled that these findings were supported by the co-defendant's interview. On Petition for Rehearing Petitioner invited the Idaho supreme court to reconsider the confrontation clause aspects of its decision--the court summarily denied the petition, with Justice Bistline again dissenting on this and other issues. (App. A, pp. 49-51).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE SENTENCING COURT IN A NON-JURY CAPITAL SENTENCING SCHEME MAY NOT CONSTITUTIONALLY BASE A DEATH SENTENCE FOR MURDER ON ITS OWN FINDING BEYOND A REASONABLE DOUBT THAT THE DEFENDANT PREMEDITATED THE MURDER WHEN THE JURY HAS PREVIOUSLY ACQUITTED THE DEFENDANT OF MURDER COMMITTED BY PREMEDITATION.

As noted above, the jury acquitted Petitioner of murder committed by premeditation. The jury was presented with two alternative theories on which it might base Petitioner's guilt of murder. The State's Information, amedned after jury selection but before evidence charged in Count II that Petitioner "did wilfully, unlawfully, deliberately with pre-meditation and with malice aforethought, murder" the victim. Count III alleged that Petitioner was guilty of murder because he "did in the perpetration of a robbery, a felony, kill" the victim. App. C, p. C4. The court instructed the jury that "[y]ou may find the Defendant guilty of either one or both of these counts." App. C. p. C14. The jury was also instructed that Petitioner's guilt could be premised on aider and abetter status. App. C, p. C15. After about seven hours of deliberation the jury sent a note to the trial judge:

> If we convict him of robbery and agree that a murder took place by one or both of the two men do we HAVE to convict him of 1st degree murder on count III, or can we convict him of second degree murder?

App. C, p. 17. The judge directed the jury to continue deliberations as previously instructed.

The jury ultimately returned a guilty verdict on Count III, felony murder. App. C, p. C9. On Count II, however, the charge of murder by premeditation, the jury returned a verdict of "not guilty." App. C, p. C7.

Nonetheless, in its Report on Imposition of the Death Penalty, App. B, pp. B1-7, the district court found "that the defendant knew the victim. . . and realized that she could identify him if she were left alive after the robbery," App. B, P. B5, and that Petitioner "apparently was mentally cool and collected, with the murder being an intentional, rational act." App. B, pp. B5-6. The court does not state the certainty by which these findings were made. It repeats their substance, however, in section 6 of its Report where statutory aggravating circumstances are listed, and "[t]hese aggravating circumstances are all found by this Court to be beyond a reasonable doubt." App. B, p. B6. In finding "c.)" the Court decides that the murder was one defined by Idaho Code §18-4003(d) (murder committed during a robbery) accompanied by the specific intent to kill. The court then adds that

> "[a]fter the robbery commenced the defendant realized the victim could identify him if she were left alive after this robbery." App. B, p. B6.

These findings amount to the dictrict court's conclusion, beyond a reasonable doubt, that Petitioner was indeed guilty of premeditated murder, since under Idaho law premeditation "does not require an appreciable space of time between the intention to kill and the killing," but rather "may be as instantaneous as two successive thoughts of the mind." State v. Olin, 103 Idaho, 591, 648, p. 2d 203 (1982); Carey v. State, 91 Idaho 706, 710, 429 P.2d 836, 840 (1967). The district court's finding of premeditation directly clashes with the jury's acquittal.

This clash is confirmed by the decision of the Idaho Supreme Court in Petitioner's case. At slip op. p. 13,

App. A, p. A13, the court rejects his argument that the judge's findings are inconsistent with the jury's verdict with a sleight of hand which actually confirms the presence of inconsistency. The court rules that the trial judge's decision was based on information not available to the jury:

> Thus, the findings of the jury, and the findings of the trial judge, are not inconsistent; rather they are based on different ranges of information. Id.

Contrary to its own terms this language establishes the presence of inconsistency--its effect is rather to explain why the inconsistency is permissible. This language is most important for what it omits. Presumably the Idaho Supreme Court could have ruled, as a matter of state law, that the trial court's finding that Petitioner killed the victim after realizing she would be a witness to the robbery was not inconsistent with a finding of premeditation either in abstract, or as this jury was instructed. That it chose not to do so establishes its own understanding that the findings were in actual conflict, and that the trial judge's "override" was based on his review of additional evidence.

This inconsistency impermissibly interferes with Petitioner's right to a final jury verdict, and to be free from double jeopardy.

The right to trial by jury is fundamental and designed to protect individuals against arbitrary government rule. Duncan v. Louisiana, 391 U.S. 145, 151, 155, 156 (1968); United States v. Martin Linen Supply Company, 430 U.S. 564, 575-5 (1977). Under this view of the jury's function, its role traditionally has been to stand between the accused and the government or the court. Thus this Court in Duncan

cited with approval a study which noted that

> when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Duncan v. Louisiana, supra, 391 U.S. at 157, citing H. Kalven, Jr. & H. Zeisel, The American Jury.

This Court has also had occasion to indicate its assessment of the proper weight to be accorded a jury's verdict on the question of guilt in a capital case. In Presnell v. Georgia, 439 U.S. 14 (1978), (per curiam), the state appellate court had affirmed a death sentence on the basis of an aggravating fact different from that found by the jury. This Court held that the rule of Cole v. Arkansas, 333 U.S. 196 (1948), is a "fundamental princip[e] of procedural fairness [which] applies with no less force at the penalty phase of a trial in a capital case than to the guilt-determining phase of any criminal trial." Presnell v. Georgia, supra, 439 U.S. at 16. The actions of the state trial court here similarly implicate those principles: it entered an area traditionally reserved to the jury--the finding of a purely factual element of the crime charged at a trial of guilt--and substituted its judgment for the jury's verdict. When a judge is permitted to ignore a jury's finding on an issue within its province the right to trial by jury is struck at its roots.

So too is the principle that no person should twice be placed in jeopardy for the same offense. This Court has previously held that Fifth Amendment Double Jeopardy provisions apply no less at the penalty phase of a capital case than in any other kinds of criminal proceedings.

Bullington v. Missouri, 451 U.S. 430 (1981). Even though the issues at the guilt trial here were not precisely identical to those at sentencing, it is clear that the sentencing judge found what the jury rejected, particularly when this Court considers the case "'in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" Sealfon v. United States, 332 U.S. 575, 579 (1948); Ashe v. Swenson, 397 U.S. 436 444 (1970). Although it may be, as the Idaho Supreme Court noted, that the trial judge had information before him the jury did not hear, the opportunity to shore up its case and present that information "is precisely what the constitutional guarantee forbids." Ashe v. Swenson, supra, 397 U.S. at 447; Bullington v. Missouri, supra, 451 U.S. at 446.

Certiorari is thus appropriate here, to resolve the substantial, conflicts between the decision of the state courts below and this Court's controlling precedents. Certiorari is also appropriate because similar issues are now pending before the Court in two cases raising them in a slightly different context. In Spaziano v. Florida, No. 83-259, the Court granted certiorari in part to determine

> [w]hether a trial judge's override of a jury's factually based decision against the imposition of the death penalty violates, in all cases, the Fifth, Seventh and Fourteenth Amendments. Id.

If this Court resolves this question against the constitutional validity of judge-override the Spaziano case would have potentially controlling implications for Petitioner's case. The trial court here based its decision to impose the death penalty in part on findings which the jury had rejected. Because of this the

court's findings and its sentence selection "overrode" the jury's verdict.

Similarly, because the decision overridden here is a factual one, this case presents double jeopardy questions which go beyond those in Spaziano, and relate to those in another case before the Court: Arizona v. Rumsey, No. 83-226. Because the facts here place these common issues in an importantly different light, certiorari should be granted here to consider this case along with those. At least, because the decisions in Spaziano and Rumsey will clearly impact on this one, the Court should hold this case for summary disposition in light of them.

II.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE IDAHO COURTS ARE IN CONFLICT WITH THE ELEVENTH CIRCUIT IN FAILING TO RECOGNIZE THE RIGHT TO CONFRONT AND TO CROSS-EXAMINE IN THE CAPITAL SENTENCING TRIAL.

As is noted above, the sentencing judge's findings and the jury's verdict are inconsistent with each other. The Idaho Supreme Court found this inconsistency acceptable, however, because the sentencing judge had access to information not provided to the jury.

> "Thus, the findings of the jury, and the findings of the trial judge, are not inconsistent; rather they are based on different ranges of information." App. A, p. 13.

In fact, only one such item bears on this issue at all: the statement of Petitioner's co-defendant Randall Bainbridge, which was attached to the presentence report Appendix D. Thus the sentencing judge's decision to depart from the conclusions reached by the jury turned only

on his reading of the evidence presented at trial (necessarily inconsistent with the jury's reading) and the statement of the co-defendant. As argued above, United States constitutional provisions prevent the judge from finding facts inconsistent with those found by the jury.

But even if judge override is permissible in some circumstances this Court should nonetheless grant the writ to determine whether the judge may override by relying only on the self-serving, unsworn, unconfronted and un-cross-examined statement of a co-defendant. By permitting such a procedure in Petitioner's case the Idaho supreme court is in direct conflict with the final decision of the United States Court of Appeals for the Eleventh Circuit in Proffitt v. Wainwright, 685 F.2d 1227, cert. denied 104 S.Ct. 509 (1983), and with this Court's precedents.

As noted above, Mr. Bainbridge, Petitioner's co-defendant was extensively interviewed by police officers in the presence of a deputy county prosecutor shortly after his arrest. Appendix D. To no one's surprise he offered an account of the killing which exonerated himself, and placed total blame on Petitioner. Mr. Bainbridge did not testify either at Petitioner's guilt or penalty trials (his own trial for murder was pending throughout) and his statements have never been subject to cross-examination. A transcript of his interview was nonetheless attached to Petitioner's presentence report and reviewed by both the sentencing judge and the Idaho supreme court.

Of course this Court has not yet decided directly whether the Sixth Amendment confrontation clause applies to capital sentencing trials. But the constitutional requirements of capital sentencings have undergone substantial evolution since Furman v. Georgia, 408 U.S. 238 (1972). The trend of this Court's capital sentencing decisions has been toward more restrictive rules of substance and procedure in this setting, with an eye toward reducing the risk of arbitrary imposition of the death penalty.

This Court's opinions establish that the Eighth and Fifth Amendments require a channeling of sentencing discretion and individualized treatment of the offender, by means of rules of procedure to guarantee the accuarcy of the information received as a basis for the choice between life and death. In Gardner v. Florida, 430 U.S.359 (1976), the Court condemned the practice of sentencing capital defendants on the basis of undisclosed confidential information made available only to the sentencing judge. The principle of Gardner is that a capital defendant's rights to due process and freedom from cruel and unusual punishment are violated when he is sentenced on the basis of information he has no opportunity to explain or to rebut. The Court stressed the value of a full and open debate and stressed the unacceptability of the "risk that some information accepted in confidence may be erroneous." Id. at 359.

* * *

"[I]f the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." Gardner v. Florida, 430 U.S.

at 359-60 (emphasis added).

This Court's concerns expressed in Gardner are best met by holding that the Sixth Amendment rights of confrontation and cross-examination apply to the admission of co-defendant's statements in the death penalty trial. The unconfronted, un-cross-examined self-serving statements of Petitioner's co-defendant prsent by their irreliability a risk of error which is intolerable in capital sentencing.

This Court recognized the right of state defendants to confront and cross-examine co-defendant's statements in Douglas v. Alabama, 380 U.S. 415 (1965). Petitioner asks the Court to apply Douglas to capital sentencing trials. Even if the Court is unwilling to rule that full confrontation clause rights attach at capital sentencing trials the holding of Douglas should be extended to capital sentencing as an element of due process. See, Id. at 423 (opinion of Harlan and Stewart, J.J.). The Constitution surely grants capital defendants in thier life or death sentencing trials the same cross-examination rights given misdemeanor defendants at trials of their guilt or innocense. "[I]t is now clear that [capital] sentencing process as well as the trial itself, must satisfy the due process clause." Gardner, supra, 430 U.S. at 358 (1977). Among the fundamental principles of procedural fairness, cross-examination has been recognized as an essential safeguard of a fair trial. Pointer v. Texas, 380 U.S. 400 (1965). This Court has recognized cross-examination as "the 'greatest legal engine even invented for the discovery of truth.'" California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence §1367 (3d ed. 1940)).

The disputed matter here (which of the two defendants did the actual planning and killing) is critical. Indeed, the tenor of the sentencing judge's Report on Imposition of the Death Penalty makes it clear that this finding was the primary basis for his decision to order death.

The Eleventh Circuit recently reached the conclusion sought here in Proffitt v. Wainwright, 685 F.2d 1227, cert. denied 104 S.Ct. 509 (1983).

> The Supreme Court's emphasis in Gardner and other capital sentencing cases on the reliability of the factfinding underlying the decision whether to impose the death penalty convinces us that the right to cross-examine adverse witnesses applies to capital sentencing hearings.

Id., 685 F.2d at 1254.

Thus the decision of the Idaho supreme court in Petitioner's case directly conflicts with that of the Eleventh Circuit in Proffitt. In addition the problem raised here is endemic to a non-jury capital sentencing scheme. This Court should grant the writ sought here to resolve these conflicts and to offer guidance to sentencers in non-jury states.

III.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE THE CONSTITUTIONALITY OF NON-JURY CAPITAL SENTENCING.

In many respects the issues raised above are difficult to resolve without considering the propriety of the entire framework within which they appear. Because non-jury sentencing contravenes Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments, because this Court has not previously addressed the constitutionality of such a scheme, and because the decision below is in conflict with a decision of the Supreme Court of Oregon, this Court should grant the writ.

As noted above, Petitioner demanded jury involvement in the capital decision, and his motion was effectively denied by the sentencing court. The Idaho Supreme Court addressed this procedure and found no state of federal constitutional defect in Idaho's death sentencing scheme.

a.) The nearly unanimous requirement of jury sentencing in capital cases among the states establishes that jury involvement in the imposition of death is constitutionally required.

It is of profound constitutional significance that Idaho stands with only a tiny minority of American states in wholly barring the jury from capital sentencing. Of the 34 states with operative death penalty laws enacted since Furman,[1] 30 involve the jury to some degree in

1. This number excludes Oregon, where the state Supreme Court recently struck down its death penalty law under the State Constitution. The Oregon law had permitted the death sentence where the prosecution could prove at the penalty phase that the defendant had acted with a mental state more blameworthy than that proved at the guilt phase, yet denied the defendant a jury determination of the existence of that mental state. State v. Quinn, 623 P.2d 630, 639-44 (Or. 1981).

capital sentencing,[2] and 27 give a capital defendant the right to a binding jury determination that he receive life imprisonment rather than death. That even four state slatures have completely excluded the jury from capital sentencing does not, moreover, reflect a belief in those states that jury sentencing is inappropriate or undesirable.[3] Each of these states had embraced jury sentencing for decades before Furman, and their decisions to enact all-judge capital sentencing schemes after Furman and Gregg--including Idaho's decision in 1977--reflect nothing more than a misperception that Furman's condemnation of unbridled jury sentencing demanded the complete exclusion of the jury from capital sentencing.[4] The legislative decisions in these states to bar the jury from death sentencing therefore manifest only a misquided attempt "to retain the death penalty in a form consistent with the Constitution." Woodson v. North Carolina, supra, 428 U.S., at 298.

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2. This number includes two states in which the jury makes a non-binding recommendation of sentence to the judge. Fla. Stat. Ann. §921.141 (West Supp. 1980); Ind. Code Ann. §35-50-2-9 (Burns 1980). The states that now wholly exclude juries from capital sentencing are Idaho, Arizona, Montana, and Nebraska. Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 14 and n.51 (1980).

3. Except for four states that entirely abolished capital punishment in the Nineteenth Century, every American jurisdiction has at least at some time authorized jury sentencing in capital cases. McGuatha v. California, 402 U.S. 183, 200 n.11 (1971). During a period of over a century beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionay jury sentencing, Woodson v. North Carolina, 428 U.S. 280, 291-92 (plurality opinion). By the time of the Furman decision in 1972, Colorado was the only state in the nation to impose capital punishment without jury sentencing.

4. The Idaho Legislature responded to Furman in 1973 by enacting H.B. 195, 1973 Idaho Sess. Laws, ch. 276. H.B. 195 removed jury discretion from the death penalty sentencing scheme by simply making the death penalty mandatory for all first-degree murders. The Idaho Legislature does not record its committee proceedings or otherwise provide a complete legislative history, and in 1973 the legislature had not yet instituted its present policy of providing a "statement of purpose" for legislation. The newspaper articles in Appendix F, then, are perhaps the only way of gleaning legislative intent in removing the jury from the death penalty sentencing process. The comments of Rep. Miner, App. F, p. F1, certainly suggest that the legislature was not spontaneously seeking to remove the jury, but was instead responding directly to what it took to be the requirements of Furman.

In 1977, after this Court ruled that mandatory death penalty sentencing was also unconstitutional, the Idaho legislature repealed the mandatory sentencing provisions to comply with Woodson and Roberts in S. 1082, 1977 Idaho Sess. Laws, ch. 154.

The "statement of purpose" for S. 1082, which established the present death penalty provisions in Idaho, reads as follows:

STATEMENT OF PURPOSE

"Only a few years ago, the United States Supreme Court made new 'rules' concerning imposition of the death penalty for serious crimes. So that we conformed with this U.S. Supreme Court interpretation of the federal Constitution, the Idaho Legislature enacted in 1973 our present death penalty Sections 18-4003 and 18-4004, Idaho Code.

Then, last year, the United States Supreme Court again changed the rules relating to capital punishment--after many states, like Idaho, had acted in response to its previous decision. The Court, in five cases, set forth new, more definitive rules concerning sentencing where the death penalty was sought to be imposed.

The purpose of this bill is to codify into Idaho law these present requirements imposed on the states by these more recent United States Supreme Court decisions on capital punishment so that we will conform with this latest expression of the law."

The comments of legislators on S. 1082 in newspaper articles collected at Appendix F, pp. 2-5, also suggest that the legislature was acting in response to its perception of this Court's demands, as opposed to expressing its own conclusion that the jury should have no part in the capital punishment decision.

4.(Cont'd) In states with a more complete legislative history, intent is much more clearly discernible. For example, the author of Nebraska's 1973 death penalty law, Attorney General Clarence Meyer, reported to the Nebraska Unicameral that, under the proposed statute:

> "ATTORNEY GENERAL: The judges are the one who decide shall it be life, or shall it be death.
>
> SENATOR CARPENTER: This is just a further interpretation to comply with what we think the Supreme Court says.
>
> ATTORNEY GENERAL: That's right."

Judiciary Committee Hearing, LB 268, pp. 29, 32-33 (February 14, 1973). The Attorney General added that he "hated to change any of our procedure for that reason because I felt it was a good one." Id., at 29.

b.) The Sixth and Fourteenth Amendments extend the criminal defendant's right to a jury to capital sentencing decisions.

Idaho's capital sentencing scheme is typical of others in that it requires the sentencer both to decide whether certain statutorily defined aggravating circumstances have been proved beyond a reasonable doubt, and if so, to weigh aggravating and mitigating circumstances to determine the propriety of a death sentence. The first stage of this sentencing scheme--the establishment of the statutorily defined aggravating facts--invokes the defendant's right to jury involvement in sentencing under the Sixth Amendment's guarantee of trial by jury and the Fourteenth Amendment's due process clause.

In recent decisions this Court has progressively acknowledged Fifth and Sixth Amendment rights in capital sentencing proceedings, even if those particular constitutional guarantees might have no place in traditional noncapital sentencing. This line of cases includes Bullington v. Missouri, 451 U.S. 430 (1981), expressly recognizing that a separate capital sentencing proceeding at which aggravating circumstances are determined and measured against mitigating circumstances is, for practical and constitutional purposes, a trial.

The Idaho sentencing scheme closely mirrors the Missouri scheme declared by this Court in Bullington to be a trial in all but name--except for the absence of a jury. Most important, the prosecution must prove specific, legislatively defined aggravating facts going beyond the elements proved at the guilt phase, and it must prove those facts beyond a reasonable doubt. The

aggravating facts defined by the statute do not differ in any quality or kind from the statutorily defined facts that the state must prove beyond a reasonable doubt at the guilt phase.

Where elegibility for a certain sentence turns on "a new finding of fact . . . that was not an ingredient of the offense charged." Specht v. Patterson, 386 U.S. 605, 608 (1967), held that finding must be made in a fashion consistent with due process. Since Specht, it has been decided that due process in criminal cases includes the right to jury trial. Duncan v. Louisiana, 391 U.S. 145 (1968). And the state cannot eliminate that right by simply "redefin[ing] the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment." Mullaney v. Wilbur, 421 U.S. 684, 698 (1974).

This is particularly clear for those "aggravating" facts--such as the issue of premeditation presented in Petitioner's case--which involve questions of mens rea. See, Knapp v. Cardwell, supra, 667 F.2d at 1267 (Adams, J.). "Where the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury." Morrissette v. United States, 342 U.S. 246, 274 (1952). The Oregon Supreme Court invalidated its death penalty statute, on alternate state and federal constitutional grounds, for precisely this reason. See, State v. Quinn, 623 P.2d 630 (Or. 1981). The decision in Petitioner's case thus stands in stark contrast to that of the Supreme Court of Oregon on this point.

Even where as aggravating allegation involves the defendant's prior record, there is substantial constitutional authority indicating that the Sixth Amendment requires a jury trial as to its truth. See, Graham v. West Virginia, 224 U.S. 616, 630 (1912); Massey v. United States, 281 Fed. 293, 297 (8th Cir. 1922). Idaho law itself entitles all criminal defendants to a jury determination of the truth of the allegation of a prior conviction, State v. Martinez, 643 P.2d 555 (Idaho Ct. App. 1982)--except in capital cases. Even if the Sixth Amendment did not apply to such findings, the selective denial of a jury trial on the truth of such facts, only in capital cases, would raise serious equal protections questions under the Fourteenth Amendment. See, Baxtrom v. Herold, 383 U.S. 107 (1966).

As Judge Friendly has stated, where an aggravating circumstance is not "an element of the crime but rather a fact going only to the degree of punishment" and increases the severity of the sentence, "the Sixth Amendment entitles the defendant to have that fact determined by the jury rather than a sentencing judge." United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

In fact, the principle that factual questions in criminal cases must be decided by a jury is even more ancient than the Sixth Amendment itself.

> [T]he founders of the English law have with excellent forecase contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.

4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed. 1900). In 1670, Lord Coke summarized a settled principle of English

jurisprudence: "Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores." W. FORSYTH, HISTORY OF TRIAL BY JURY, 259 (1852).

> The distinction between the provence of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The jury must in all cases determine the value and effect of evidence. . . . The law throws upon them the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect.

Id. at 282.

> It may safely be said that at the time of the American Revolution the general principle was well established in English law that "juries must answer to questions of fact and judges to questions of law. This is the fundamental maxim acknowledged by the constitution."

Scott, Trial by Jury and the Reform of Civil Procedure, 31 HARV. L. REV. 669, 679 (1918). That maxim underlay the "insistence on jury trial" in the first Congress, which led to the Bill of Rights. See, Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV.L.REV. 49, 74-5 (1923).

c.) The Eighth Amendment's principle that death sentences must satisfy evolving standards of decency and the dignity of man requires jury participation in capital sentencing.

In view of the "awesome finality of a capital case," Kinsella v. Singleton, 361 U.S. 234, 249 (1960) (Harlan J., concurring and dissenting), this Court has repeatedly recognized the crucial rule juries play in the determination whether a capital defendant merits the death sentence. Gregg v. Georgia, 428 U.S. 153, 181-82, 190-92 (1976) ; see, Duncan v. Louisiana, 391 U.S. 145, 156 (involvement of jury in capital cases reflects a "reluctance to entrust plenary powers over . . . life [and death] . . . to one judge or a group of judges."

The Eighth Amendment requires at least some jury participation in capital sentencing can best be appreciated by reference to the substantive Eighth Amendment standards this Court has invoked in holding that the death penalty is not invariably cruel and unusual punishment.

A particular punishment is not cruel and unusual if it satisfies two criteria. First, the penalty must accord with contemprary moral and social values by reflecting "the evolving standards of decency that mark the progress of a maturing society." Gregg v. Georgia, supra, 428 U.S. at 173, quoting trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). Second, the punishment must respect "the dignity of man" by serving legitimate penological goals and by bearing a reasonably proportionate relationship to the crime for which it is imposed. Gregg v. Georgia, supra, 428 U.S., at 173. An essential medium of these concepts is the jury.

To support its conclusion that imposition of the death penalty in some circumstances could accord with "evolving standards of decency," the Gregg plurality looked to the two most reliable sources of responsible public attitudes and values: legislatures and juries.[5] Thus, even with respect to the general question whether the death penalty comports with evolving social and moral

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5. The plurality noted that a majority of the state legislatures had reenacted the death penalty after the Court's 1972 Furman decision, Gregg v. Georgia, 428 U.S. 153, 179-81 (1976) (plurality opinion), and that since Furman American juries, though imposing the death penalty infrequently, had done so often enough to suggest that they did not categorically disapprove of the penalty. Id., at 181-82.

standards, the plurality found it necessary to rely on patterns of jury behavior. The plurality's emphasis on evolving standards, id. at 172-73, suggests that the courts cannot rely on legislatures alone as reflectors of reponsible community values, since a statute is static, and, as public values change, it may become a less reliable indicator than the judgment of a jury.

The Eighth Amendment also demands individualized consideration of the propriety of the death sentence in every capital case. Lockett v. Ohio, 438 U.S. 586, 605 (1978)(plurality opinion).. Given "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," Ibid., state capital sentencing schemes must ensure that individual death sentences satisfy the moral demands of evolving standards of decency. See, Woodson v. North Carolina, 428 U.S. 280, 303-305 (1976) (plurality opinion); Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (plurality opinion). Whatever partial role the legislature can play in reflecting responsible public sentiment on the general validity of the death penalty, only a jury can ensure that a particular death sentence meets this Eighth Amendment command. "'One of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] . . . is to maintain a link between contemporary community values and the penal system.'" Gregg v. Georgia, supra, 428 U.S. at 181 (plurality opinion), quoting Witherspoon v. Illinois, 391 U.S. 510, 517, n.15 (1968); see, Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion).

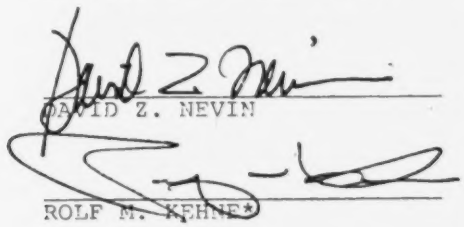
d.) Conclusion

The prior decision of this Court and that of the Supreme Court of Oregon establish that Petitioner is constitutionally entitled to have a jury decide two issues: first, whether the crime he committed is of the type for which a death sentence may be imposed, and second, whether a death sentence is warranted under the circumstances of his particular case. Idaho denied him both these rights. Petitioner's case thus goes beyond even the issues in Spaziano, supra, in which the jury resolved the first issue. This Court should grant the writ to resolve these lower-court conflicts and to declare that non-jury sentencing cannot stand constitutional scrutiny.

IV. CONCLUSION

The Petition for Writ of Certiorari should be branted.

Respectfully Submitted,



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IN THE SUPREME COURT OF THE STATE OF IDAHO
Nos. 14435 - 15022

STATE OF IDAHO, Plaintiff-respondent,	)	Boise Special Term, February 1983
v.	)	Filed: August 15, 1983
LACEY M. SIVAK, Defendant-appellant.	)	Frederick C. Lyon, Clerk

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Robert Newhouse, District Judge.

Appeal from sentence of death imposed on convictions of first degree murder, robbery, and possession of a firearm in the commission of a felony. Judgment of conviction and sentence affirmed.

Klaus Wiebe and David Z. Nevin, Boise, Idaho, for appellant.

Jim Jones, Attorney General, and Lynn E. Thomas, Solicitor General, Boise, Idaho, for respondent.

BAKES, J.

Appellant appeals from a sentence of death imposed by the trial court on convictions of first degree murder, robbery, and possession of a firearm during the commission of a felony.[1] Our review is not only in response to the

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1. We note that this case arrived at the appellate level under the same circumstances as State v. Creech, ___ Idaho ____, ____ P.2d ___ (issued May 23, 1983). The district judge filed written findings of fact and conclusions of law which were delivered to Sivak and his counsel, without benefit of an open court hearing. Because I.C. § 19-2503 and I.C.R. 43(a) require that a defendant's sentence be given in open court with the defendant and counsel present, this Court, by order issued on March 24, 1983, vacated the sentence of death and remanded to the district court for imposition of a sentence in open court. The district judge then convened court on April 4, 1983, and in open court sentenced the defendant to death. Defendant's appeal from that sentence was consolidated with his previous appeal, and the present opinion disposes of all issues now present in the consolidated cases.

appeal, but also pursuant to automatic review of death sentences mandated by I.C. § 19-2827.[2]

On April 6, 1981, Dixie Wilson, an attendant at a self service gas station, was discovered near death by a customer. She had been stabbed numerous times and shot several times. Evidence indicated she had also been sexually molested. She later died from her wounds.

Witnesses saw two men inside the station with Wilson shortly before the murder, one they identified as Russell Bainbridge. Appellant and Bainbridge were seen together before and after the killing.

Appellant admitted being present during the robbery and murder, but claimed he was merely an innocent bystander. He claimed he did not participate in the robbery and murder and did not carry a firearm. However, appellant's fingerprint was found on the murder weapon.

Evidence indicated appellant had previously worked at the station, was known to the victim, had expressed animosity toward her, and had called to inquire who would be on duty at the station on April 6, 1981. The gun used in the attack was found in a storage shed rented by appellant.

Appellant was convicted and sentenced to death. He appeals from his conviction for possession of a firearm, and from the sentence of death imposed on conviction for murder, robbery and possession of a firearm.

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2. I.C. § 19-2827 reads as follows:
"19-2827. REVIEW OF DEATH SENTENCES--PRESERVATION OF RECORDS.--(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. ...

"(b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by way of appeal.

...."

I

Initially, appellant argues that Idaho's death penalty statute, I.C. § 19-2515, is unconstitutional. We first note that a capital sentencing scheme substantially similar to Idaho's was upheld by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). However, appellant makes specific objection to several areas of Idaho's statute which we consider separately.

A.

Appellant first argues that the involvement of a jury in the capital sentencing process is mandated by the United States Constitution. He asserts that since Idaho's death penalty scheme fails to include a jury in the sentencing procedure, it is unconstitutional. The same argument was made and rejected by this Court in State v. Creech, ____ Idaho ____, ____ P.2d ____ (issued May 23, 1983). We again reject appellant's argument for the same reason we rejected it in Creech.

In making this argument, appellant directs our attention to those United States Supreme Court cases that require death penalty schemes be consistent with "evolving standards of decency." Gregg v. Georgia, supra; Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1978). He argues that only the involvement of a jury can ensure that the imposition of the death penalty remains true to societal standards of decency.

However, the United States Supreme Court has never decided the question of which authority is required to decide what sentence to impose in capital cases - judge or jury. The specific question of the constitutionality of a scheme not involving a jury in the sentencing process has never been decided by that court. Indeed, the Supreme Court has recognized, in dicta, that judge sentencing should lead to greater consistency in sentencing, which is one of the ultimate goals in the capital sentencing scheme.

> "This Court has pointed out that jury sentencing in a capital case can perform an important societal function, ... but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976), reh. den. 429 U.S. 875.

The values possessed by a particular community, which should somehow be reflected in a capital sentencing scheme, are adequately represented by the elected representatives of the community, who enact the local death penalty statutes. Their representative status, coupled with the considered judgment of an elected trial judge as the sentencer, should assure both consistency in the application of the death sentence and adequate reflection of community values. We see no reason why a sentencing scheme not involving the jury should be declared unconstitutional under the United States Constitution. See Barclay v. Florida, ____ U.S. ____ (issued July 6, 1983) (where jury recommended life sentence, trial judge fully justified in overruling jury and imposing death sentence).

B.

Although not alleged by appellant here, an argument has been made that Idaho's present sentencing scheme, excluding the jury, violates the Idaho Constitution. While normally we would not consider arguments not raised by the parties, capital cases present an exception to that rule in that we are required by law to conduct an independent review of cases where the death penalty has been imposed. I.C. § 19-2827. We now proceed to consider whether the present I.C. § 18-4004 and I.C. § 19-2515, as a sentencing scheme, violate the Idaho Constitution.

Our state constitution was drafted August 6, 1889, and adopted by the people in November of 1889. Art. 1, § 7, of that constitution reads: "§ 7. RIGHT TO TRIAL BY JURY.-- The right of trial by jury shall remain inviolate ...." This section has been interpreted in several of our cases as guaranteeing the right to trial by jury as it existed at the time of the adoption of the Constitution. See People v. Burnham, 35 Idaho 522, 207 P. 589 (1922); Christiansen v. Hollingsworth, 6 Idaho 87, 53 P. 211 (1898). Thus, to determine what right is preserved, it is necessary to determine what right existed at the time of enactment of the Constitution.

The tracing of the sentencing function in capital cases begins with the 1864 Criminal Practice Act, which, although not in effect at the time of enactment of the Constitution, was an immediate predecessor of the section in effect in 1889. The 1864 section read:

> "[T]he jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree .... Every person convicted of murder of the first degree, shall suffer death ...."

Under the 1864 section, the jury, in determining the crime committed, in effect chose the sentence to be imposed. A similar procedure existed in the 1887 enactment, 1887 R.S. § 6563. It read:

> "Every person guilty of murder in the first degree shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the Territorial prison not less than ten years, and the imprisonment may extend to life."

Thus, if a person was found guilty of first degree murder, the penalty was death. However, if a person was found guilty of second degree murder, the sentencer was invested with the discretion to set a term of imprisonment from ten years to life. That sentencer was the judge, and not the

jury. See 1887 R.S. § 7992 (where discretion is conferred upon the court, the court will hear evidence in aggravation or mitigation of the punishment).

Under the scheme that existed at the time of the adoption of the Idaho Constitution, the jury determined whether a person was guilty of first or second degree murder. Once the degree of crime was determined, the jury's factfinding function was completed. It is certainly true that the jury's decision had an impact on the sentence which was imposed. Thus, if the jury determined that the defendant was guilty of only the crime of second degree murder, no death penalty could be imposed. However, that is only an incidental consequence which is true in every case where a jury finds a defendant guilty of a lesser included offense from that with which the defendant is charged. Thus, if a defendant is charged with first degree burglary, and the jury finds him guilty of second degree burglary or perhaps petit larceny, the jury's determination will have a substantial impact upon the sentence which is imposed upon the defendant. However, that does not mean that under our Constitution a defendant is entitled to have a jury impose the sentence. While the jury's determination of the crime of which the defendant was guilty affects the sentence which may necessarily be imposed, that incidental effect does not mean that the jury is an integral part of the sentencing process. The argument that is made that R.S. § 6563, in effect in 1889 when the Idaho Constitution was adopted, constitutionalized a right to be sentenced by a jury in capital cases, basically misconstrues the distinction between the factfinding function of determining the degree of crime of which the defendant is guilty performed by the jury, and the sentencing function which is to be performed

by the court. Accordingly, we conclude that [illegible] the Idaho Constitution does not require the participation of a jury in the sentencing process in a capital case.

C.

Appellant also asserts that I.C. § 19-2515(f)(8) is unconstitutionally vague. Again, somewhat the same argument was made by the appellant in State v. Creech, supra. In Creech, the appellant argued that I.C. § 19-2515(f)(8) was unconstitutionally vague. In that case, this Court construed "propensity" in such a way as to narrow its meaning so that it could not possibly be interpreted to apply to every murder coming before a state trial court.

> "We would construe 'propensity' to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the 'propensity' language to specify that person who is a willing, pre-disposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder." State v. Creech, supra at _____.

Thus, appellant can no longer claim that (f)(8) is unconstitutionally vague because of this limiting construction placed on it by this Court. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980). However, he does attempt to make a somewhat different argument concerning the constitutionality of this section. He argues that the presence of the word "probably" allows a trial judge to find an aggravating circumstance based on less than a reasonable doubt, in contravention of our opinion in State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981).

I.C. § 19-2515(f)(8) reads:

> "19-2515. INQUIRY INTO MITIGATING OR AGGRAVATING CIRCUMSTANCES--SENTENCE IN CAPITAL CASES--STATUTORY AGGRAVATING CIRCUMSTANCES--JUDICIAL FINDINGS.--...
>
> ....
>
> (f) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:
>
> ....
>
> (8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."

For a trial judge to rely on (f)(8) as an aggravating circumstance in the imposition of the death penalty, he must find beyond a reasonable doubt, that the defendant exhibits such propensity.

Reading (f)(8) in its entirety, we fail to see how it can be reasonably argued that the statute could be interpreted to require only a finding based on the preponderance of the evidence, rather than beyond a reasonable doubt, as it expressly states. Furthermore, the trial judge expressly stated that he found the circumstance to exist beyond a reasonable doubt. He also noted:

> "The defendant, both by prior conduct and conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society. It is impossible for this court to believe that society will ever be safe while this defendant remains mobile and active."

The interpretation that appellant urges is contrary to the clear wording of the statute. I.C. § 19-2515(f)(8) merely requires a finding, beyond a reasonable doubt, of the existence within a defendant of a propensity to commit murder likely to cause a threat to society. Thus read, (f)(8) is not unconstitutionally vague.

Appellant also argues that I.C. § 19-2515(f)(5) and (f)(6) are unconstitutionally vague. In State v. Osborn,

supra, and State v. Creech, supra, we considered these arguments and placed limiting constructions on these sections so as to eliminate any possible vagueness. We need not consider those arguments again here.

D.

Appellant also argues that I.C. § 19-2515(d) is unconstitutional because it does not require the trial judge to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Again, a similar argument was considered and rejected in State v. Creech, supra. Appellant confuses the standard applicable to proof of an aggravating circumstance with the weighing process that must occur whenever any sentence is imposed.[3] As noted by the Eleventh Circuit recently:

> "[Appellant's argument] ... seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, ... the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party." Ford v. Strickland, 676 F.2d 804 (11th Cir. 1983).

The "beyond a reasonable doubt" standard applies to the existence of aggravating circumstances, not to the process of weighing them against the mitigating circumstances, which must occur before sentence is imposed. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), reh. den. 685 F.2d 139 (1982). See Zant v. Stephens, ____ U.S. ____ (Slip Op. released June 22, 1983) (where United States Supreme Court upheld the Georgia sentencing scheme which provided that, by a finding

3. We note that in State v. Wood, 648 P.2d 71 (Utah 1982), the Utah Supreme Court held that the trial judge must find aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. However, they so ruled in interpreting their own statutory scheme and not on the basis of federal or state constitutional principles. Id. at 82. We note that Utah's capital sentencing scheme is somewhat different from Idaho's. We find the reasoning in that case to be unpersuasive.

of a statutory aggravating circumstance beyond a reasonable doubt, the defendant was eligible for the death penalty, and therefore all evidence is to be considered, and it is within sentencer's discretion to balance aggravating and mitigating circumstances, not pursuant to any special standard. Slip Op. pp. 10-11); Barclay v. Florida, supra (where Florida statute provided for weighing statutory aggravating circumstances against mitigating circumstances not pursuant to any special standard for the weighing process, statutory scheme approved). Appellant's argument has no merit.

II

Appellant also makes several assertions concerning the findings and conclusions of the trial court. He asserts that the court relied on non-statutory aggravating circumstances,[4] that some of the findings were unsupported by the evidence, that some of the findings are inconsistent with the jury's verdict, and that some are incomplete under State v. Osborn, supra. We will consider each of these assertions separately.

A.

Appellant argues that the court erred in its consideration of non-statutory aggravating circumstances. It appears that the trial court used the same type of format in its written sentencing decision as that used in State v. Creech, supra. The findings of the court are divided into sections, with the individual sections labeled differently:

"4. Facts and Argument Found in Mitigation.

....

"5. Facts and Argument Found in Aggravation.

....

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4. I.C. § 19-2515(f) sets out the statutory aggravating circumstances to be considered by a trial judge in sentencing.

"6. Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code. These aggravating circumstances are all found by this court to be beyond a reasonable doubt."

Appellant argues that a trial court's consideration of non-statutory aggravating circumstances creates both statutory and constitutional problems. We previously ruled in Creech that a trial court is not limited as to the aggravating circumstances it may consider. It is also clear from our opinions in both Creech and Osborn, supra, that a trial court, while it may consider all relevant circumstances in a particular case, must find at least one statutory aggravating circumstance to exist beyond a reasonable doubt. This satisfies the constitutional requirement of notice. Since the trial court expressly found four of the statutory aggravating circumstances to exist beyond a reasonable doubt, the sentence was not imposed in violation of any of appellant's constitutional rights.

B

Appellant cites two of the trial court's findings and argues that they are not supported by the evidence. The allegedly objectionable findings are:

"5. ...

"a. ... The defendant dominates his co-defendant, and is primarily responsible for all that occurred.

....

"6. ...

....

"d. The defendant, both by prior conduct and conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society."

The evidence before the trial court was more than sufficient to sustain both of these findings. An in-depth interview of appellant's accomplice was conducted, and was included in

the presentence report. It contains references to the relationship between the two, lending support to finding 5a. Finding 6d is supported by evidence of the brutal murder committed by this defendant, by his lack of remorse, willingness to participate in the crime, and by testimony of his prior offer to do violence to and, inferentially, to kill another person other than Dixie Wilson. Because these findings are supported by the evidence, we will not disturb them.

C.

The jury instructions given in the present case, taken from the information, set forth two alternatives for the jury. In Count II, the state alleged that appellant should be found guilty of first degree murder because the crime was committed with premeditation and malice aforethought. Count III alleged that appellant was guilty of first degree murder because the crime was committed during the course of a robbery. The jury, in returning its verdict, acquitted appellant of Count II and convicted him of Count III. Appellant now alleges that several of the district court's findings are inconsistent with the jury's verdict. The findings cited by appellant are:

> "That the defendant knew the victim ... and realized that she could identify him if she were left alive after this robbery.
>
> ....
>
> "He apparently was mentally cool and collected, with the murder being an intentional rational act.
>
> ....
>
> "After the robbery commenced the defendant realized the victim could identify him if she were left alive after this robbery."

The findings of the trial judge in sentencing are based not only on what he has heard during the trial, but also on the information he gathers from many other sources. A trial

court's duty to tailor a sentence to an individual defendant necessitates access to a wide range of information about that defendant. State v. Johnson, 101 Idaho 581, 618 P.2d 759 (1980). This is especially true in cases involving the possible imposition of the death penalty, wherein the United States Supreme Court requires that the sentence be determined according to the requirements of each individual case. See Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976). The trial judge in the present case received an abundance of information during the sentencing portion of defendant's trial concerning the character of the defendant and his possible inclination. The trial judge thus issued his findings based on his access to this broad range of information. The jury did not have access to the same amount of information in returning its verdict. Thus, the findings of the jury, and the findings of the trial judge, are not inconsistent; rather, they are based on different ranges of information. We see no error in the trial judge's findings on this issue.

D.

Appellant also argues that the findings of the district judge were incomplete and inconsistent in light of our opinion in State v. Osborn, supra. In Osborn, we placed limiting constructions on I.C. § 19-2515(f)(5) and -(6). Appellant argues that the trial judge's findings do not affirmatively show that he used those limiting constructions in making his findings on those specific circumstances. Appellant seems to argue that a trial judge should be required to specifically set forth findings on the limiting constructions themselves. Trial judges are required by I.C. § 19-2515 to find at least one statutory aggravating circumstance beyond a reasonable doubt. The limiting constructions

placed upon these statutory circumstances in Osborn were set forth to provide a definitional aid to trial judges attempting to apply the circumstances to the particular facts of the case they are considering. There is no directive in either the statute or Osborn requiring a trial court to set out the specific language used in Osborn before this Court will uphold that court's findings. The findings made by the trial court in this case sufficiently comply with the standards set out in I.C. § 19-2515(f), State v. Osborn, supra, and State v. Creech, supra.

III

Appellant asserts error in the inclusion in the presentence report of a psychiatric evaluation. This evaluation, drawn up by Dr. John Stoner, resulted from a pretrial meeting between Dr. Stoner and appellant, arranged by appellant's counsel, during the investigation of the propriety of a defense based on mental disease or defect. The evaluation was paid for by appellant's family, and never offered in evidence during trial. Appellant argues that the evaluation formed the basis of the presentence investigator's report, but was used in violation of appellant's attorney/client privilege, his psychologist/patient privilege, and his fifth, sixth and fourteenth amendment rights. Without deciding whether use of such material would violate any of appellant's rights, we note that upon motion by defense counsel the trial judge expressly refused to consider the evaluation in his sentencing decision, and references to the evaluation were stricken from the presentence report. The record shows that the trial judge made the following comments:

> "And the Court, for the record, has had all the reports sanitized by recovering this psychiatry report, so none of the three of us have read these particular items.
>
> ....

> "I will order that the presentence report remain sanitized as done so that the Court and both counsel are not aware of the report of Dr. Stoner. And I will not take the report of Dr. Stoner into account in the course of this sentencing. Motion granted."

Thus, the trial court specifically said that he had not read the report or references to it, and specifically declined to take the report into consideration in sentencing. We will not presume error when the record, on its face, militates against such a conclusion. Appellant's argument, that the presentence investigator took the report into consideration in preparing the presentence report, and that it affected the report and thus influenced the sentencing judge, is without merit.

IV

Appellant also argues that he was improperly convicted of the crime of possession of a firearm during the commission of a felony, and that a death penalty entered in conjunction with such a conviction cannot stand where the possession conviction was obtained based on instructions which did not comport with this Court's decision in State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980).

In Thompson, which was released prior to appellant's trial, we ruled that a person could not be convicted under I.C. § 19-2520, the possession statute, unless it is shown that the defendant is the person who actually used the gun. The statute cannot be used to convict a person who was merely an aider or abettor. Appellant urges that, upon proper instructions, the jury could have found that he was merely an aider or abettor, and never actually possessed the weapon.

The trial judge gave the following instruction concerning the possession charge:

> "If you find the defendant guilty of any of these crimes it then will become your duty to determine whether or not, in that crime, the defendant carried, displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing the crime."

We feel that this instruction adequately informed the jury that, to convict the appellant, he must have "carried, displayed, used, threatened, or attempted to use" a firearm in the commission of a felony. There was sufficient competent evidence upon which to base a finding of actual possession by the appellant. The instruction being adequate, we will not disturb the conviction on that charge.

Pursuant to our independent review in death penalty cases, I.C. § 19-2827 requires us to conduct a review of the record to determine if this particular death sentence resulted from any arbitrary factors, such as passion or prejudice. That section also requires us to determine if the sentence imposed in this particular case is excessive or disproportionate to sentences imposed in similar cases. Our independent review of this case does not reveal any indication of existence of arbitrary factors. Our review of similar cases involving the death penalty, while necessarily limited by the lack of such cases, as noted in State v. Creech, supra, does not reveal the presence of any particular excessiveness or disproportionality in this particular case. The heinous nature of the crime committed in this case, and the nature and character of the defendant, makes the imposition of the death penalty in this case both proportionate and just.

The judgment of conviction and sentence imposed are affirmed.

DONALDSON, CJ., and SHEPARD, J., concur.

BISTLINE, J., dissenting.

In State v. Creech, ___ Idaho ___, ___ P.2d ___ (Opinion No. 74, Sup. Ct. Nos. 14480 & 15000, petition for rehearing filed May 23, 1983), I expressed a strong concern with a majority opinion which refused to discuss the view of Justice Huntley who in dissent pointed out that our Idaho Constitution guarantees that no person shall be executed except on direction of a jury. In today's opinion the same majority, now deigning to discuss that issue, and completely ignoring that written by Justice Huntley and by myself in Creech, rationalizes around the research which we there presented by noting the absurdity that it was the judge who was the sentencer where the jury convicted an accused of second degree murder--but at the same time facetiously conceding "that the jury's decision had an impact on the sentence which was imposed." This is pure sophistry at its best. The jury, if it convicted the accused of first degree murder thereby sent the accused to the gallows. That is an impact indeed. As stated in my Creech dissent:

> "In People v. Walters, 1 Idaho 271 (1869), the defendant was charged with murder in the first degree. The jury, knowing that a first degree conviction required execution, recommended the mercy of the court.
>
> "'We the jurors in the above entitled cause find the Deft guilty as charged in the Indictment and recommend him to the mercy of the court.
>
> L. Jackson
> Foreman of Jury'"

It cannot in good conscience be argued that from 1869 until Furman it was not the jury which made the life or death decision. Any lingering doubt as to the intention of the legislature should be dispelled by simply observing that following the 1911 Amendment to I.C. § 18-4004[1] the courts of

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[1]As amended in section 18-4004, the legislature showed its understanding that the jury had been and would continue as the

Idaho, including this Supreme Court, continued to acknowledge the jury's function as sentencer, as was carefully documented in my dissenting opinion in Creech wherein were set forth verbatim the jury verdicts in Hoagland, Redding, VanVlack, Golden, Owen, Clokey, Gonzales, and Buckley--which latter was the last first degree murder to be reviewed in this Court under the law as it existed prior to Furman's advent.

Regrettably one must conclude that the author of today's opinion for the Court has yet to read my Creech dissent. Nothing in today's majority opinion supports its bald conclusion "that Art. 1, section 7, of the Idaho Constitution does not require the participation of a jury in the sentencing process in a capital case." The best that can be said for the majority opinion is that it does recognize that where the jury convicts of second degree murder, "no death penalty could be imposed," but this is said to be an incidental effect. Some may consider it a deplorable state of affairs that in a matter of such grave moment the majority does not even attempt to comment upon the proceedings of the Constitutional Convention and the remarks of Mr. Heyburn, Mr. Claggett, and Mr. Ainslie in the drafting of Art. 1, section 7--which was thereafter adopted by the people. Instead the majority digresses into the wholly irrelevant field of the judge's discretion where the jury's verdict was to convict of murder in the second degree.

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sentencer:

> "Punishment for murder.--Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life."

With equal facility the majority facilely avoids discussing the teaching of State v. Miles, 43 Idaho 46, 248 P. 442 (1926), or attempting to explain away the words and wisdom of Justice Ailshie in In re Prout, 12 Idaho 494, 86 P. 275 (1906). Instead the majority opinion speaks of the sentencing discretion in, of all things, burglary cases. It gives us the remarkable pronouncement that the jury's determination of whether the defendant is guilty of first or second degree murder, or perhaps the included offense of petit larceny, "will have a substantial impact upon the sentence . . . ," and that such "does not mean that under our Constitution a defendant is entitled to have a jury impose the sentence." No one has ever contended that it did in other than murder cases; the statement of the majority only serves to show no knowledge of the documentation of the Creech dissenting opinions, at the best, or, at the worst, a complete disregard for the irrefutable teaching of that documentation. In an ordinary case this would be thought regrettable. In a case where we review the imposition of a death sentence, it may well be regarded as unpardonable.

Most disturbing is the knowledge that prior to Furman the capital death sentencing procedures in Idaho were within a small percentage of being those which the Woodson Court would later prescribe. Basically all that was needed, prior to Furman, was a bifurcation so that a person accused of first degree murder would not be prejudiced by attempting at a single trial to prove both that he did not deserve the death penalty and that he was not guilty of first degree murder--a Catch 22 situation if ever there was one. For example, see State v. Clokey, 83 Idaho 322, 364 P.2d 159 (1961), and State v. Owens, 73 Idaho 394, 253 P.2d 394 (1953), both discussed in my Creech dissent. Those cases, and others, make it clear

that this Court earlier, and absent legislative involvement, recognized that the trial courts should properly instruct the jury in a capital case to the end that the jury did not arbitrarily or capriciously invoke the penalty of death.

Following Woodson the legislature set guidelines to follow, and, unfortunately believing (as the Statement of Purpose to the proposed 1977 amendment shows, set out in the Creech dissenting opinion of Justice Huntley) that the Supreme Court of the United States had barred juries from continuing as sentencing authorities, made those guidelines for the benefit of judges. Nonetheless, the guidelines are there, and all that is required now, primarily, is for this Court to legitimize the 1977 Death Penalty Act by declaring that a sentence of death will constitutionally be imposed as the judgment of twelve jurors--in whose selection the defendant played a large part--instead of being imposed by a single individual who holds the office of district judge. Alternatively, if this Court fails to follow that route, which simply encompasses a holding that wherever in I.C. § 19-2515 the word "court" appears, "court" shall be construed to mean the jury and not the judge.[2] To do so would comport with an earlier court's understanding that "[i]n all cases triable by a jury, the court is made up of the judge and the jury." State v. Ramirez, 34 Idaho 623, 203 P. 279 (1921) (not to be confused with State v. Ramirez, 33 Idaho 803, 199 P. 376 (1921)). As to the problem which I just mentioned in footnote 2, the Ramirez Court also noted that "[t]he words 'judge' and 'court' are frequently used as convertible terms . . . ." 34 Idaho at 634. This Court today would do a service to its people were it to thus put a saving gloss on the 1977 legislation. My own view,

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[2] I am not unaware of the use of the words "judge" and "trial judge" in I.C. section 19-2827(c)(2) and (e)(2).

however, is that this Court will not do so--as evidenced by the illogical reasoning of the three-member majority which brings it to the conclusion that our Idaho Constitution does not give a capital defendant the right to have his fate decided by a jury. In the long-run it would be preferable if the legislature attended to the matter.[3] Meanwhile, one may be certain, a bare majority of this Court will continue to uphold judge-imposed death sentences.

Another defect in the present scheme for capital sentencing is found in I.C. § 19-2827, mentioned in my separate opinion in State v. Osborn, 104 Idaho ___, ___ P.2d ___ (1983) (Supreme Court No. 14333), wherein I pointed out, as applicable herein reviewing § 19-2827:

> "[T]here is a defect in I.C. § 19-2827(g) wherein and whereunder it is only required that 'The supreme court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975.'
>
> "Collecting such records is not a difficult task, because of the automatic review provisions of I.C. § 19-2827(a). Preservation is also no problem, because the Court does keep one copy of all appellate review proceedings. My own conclusion is that the drafter had in mind a separate collection of death penalty findings and conclusions in all cases, readily available on request to district courts, prosecutors, and defense counsel. Such a collection, which we do not presently maintain as such, will indeed be a helpful tool, but I see it as virtually meaningless unless the collection includes all sentencing hearings held following a conviction of first degree murder. Only in this manner will this Court in making its review be able to determine 'whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' I.C. § 19-2827(c)(3).[2] Only in this manner will sentencing authorities have established guidelines as to the state-wide norm in imposing the penalty for murder in the first

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[3] In his Creech opinion, Justice Huntley urged the legislature "to amend the statutes to provide for proper jury participation in order that future capital punishment cases will not be subject to this serious defect." Hopefully, the 1984 legislature will respond when it convenes in January.

> degree. Only in this manner can prosecuting attorneys and defense attorneys be adequately informed as to the pulse of Idaho's people--from among whom come the jurors who decide guilt or innocence, and who constitutionally should even now be determining the sentence to be imposed. When we have provided for a proper collection, and when we have required jury sentencing--both of which are within the Court's authority to provide for--thus putting a saving gloss upon the entire procedure--the entire citizenry may profit from a sentencing procedure which is constitutionally sound.
>
> [2]The tenor of the statute is such that I do not hesitate to express a belief that the drafter thereof intended the collection to include all dispositions of first degree murder convictions."

The majority in today's opinion properly states that § 19-2827 requires of our review that we determine whether "the sentence imposed in this case is excessive or disproportionate to sentence imposed in similar cases." This is as it should be. But, because of the defect in the statute above described, the majority wholly ignores the facts and circumstances in the extremely similar case of State v. Major, 104 Idaho ___, ___ P.2d ___ (1983). Major too involved a first degree murder conviction, and there the weapon was a knife only--which is considered by many more brutal and sadistic than being shot to death. The district judge in Major made the findings in aggravation and mitigation which are statutorily required:

> "5. Aggravation The court finds, from the evidence, that a heinous, atrocious attack occurred upon a human being. As the state proved at the trial, and reiterated at the hearing, the killing of Tony Mesa involved injuries inflicted prior to his death, then the death injury, and brutal aggravation of the death wound. The Court finds no possible justification for the nature of the attack, and finds no evidence that the victim was armed or able to defend himself in any way.
>
> "The Court further finds that the accused has a criminal record which extends back to 1962, and involves at least seventeen narcotics offenses. The Court further finds that, within ten years prior to this offense, the accused was convicted of a felony, second degree burglary. The defendant himself admitted commission of a felony, and the

pre-sentence report shows the conviction occurred in June, 1975, in San Bernardino County, California. The Court also finds that the accused has twice been convicted of some sort of assault on another person.

6. Statutory Aggravating Circumstances The court finds beyond a reasonable doubt that two of the statutory circumstances set forth in Idaho Code, § 19-2515 exist. The murder was, in the opinion of the court, 'especially heinous, atrocious or cruel, manifesting exceptional depravity.' The testimony of the autopsy pathologist graphically depicted the brutal, destructive knife attacks which were inflicted upon the victim. The nature of the wounds made it apparent that the attack virtually amounted to a series of torturing wounds which finally culminated in the massive cutting of the victim's throat. The evidence made it clear that after inflicting the throat wound, the assailant then made ripping motions with the knife which were simply mutilating in nature. There was enough bleeding from the early wounds to make it clear that the victim was seriously injured and no doubt in great pain before the final, brutal attack was made. The nature of the attack, taken in stages as it was, also clearly, and beyond a reasonable doubt, shows that the defendant, at the time of the attack, 'exhibited utter disregard for human life.' The Court therefore finds, that the circumstances set forth in Idaho Code 19-2515 (f) (5) and (6) have been established beyond a reasonable doubt."

R., pp. 150-51.

Major is exactly one of the "similar cases" referred to in I.C. § 19-2827(c)(3), and yet the majority of the Court in making their review does not consider it. How, one must ask, can a reviewing court determine whether a sentence of death "is disproportionate to the penalty imposed in similar cases" if it does not collect, preserve and refer to all capital cases? The majority apparently sees the matter in a different light. The statute, however, is clear that "the penalty involved in similar cases" may be the death penalty, or it may be a life sentence. Again, no argument to the contrary can in good conscience be made. Nor should it. Should the members of this Court, regardless of how § 19-2817 is

read, shut their eyes to the penalty that the stabbing, slashing murderer in Major received? It was not a sentence of death:

> "7. Why The Death Penalty Is Not Being Imposed This Court is of the opinion that the statutes providing for imposition of the death penalty, and for imposition of the death penalty by lethal injection are constitutional, and are necessary in our society. And, even though the Court finds the existence of two of the statutory aggravating circumstances in this case, the death penalty is not here being imposed. The line which must be crossed before the extreme penalty is imposed is a fine one, and ultimately the decision which the Court must make is a very subjective one. Here, the Court has determined that the victim was not an innocent member of society whose death grew out of no criminal conduct on his part. The court truly believes that the victim was a drug supplier who for some reason had cut off the supply to the accused. During the negotiations to resume that supply line, something went wrong, and the violence of the drug sub-culture erupted. Every person who lives in that sub-culture risks the same violent end which befell the victim here. The Court believes that this accused would again repeat his actions if confronted with the same set of circumstances, and thus is a danger to other human beings. But the Court also believes that the danger to innocent members of society can be avoided by incarcerating the defendant for the rest of his life. And, the sentence which the Court imposes today will accomplish such incarceration if allowed to run its proper length.
>
> "THEREFORE the death penalty should not be imposed on the defendant for the capital offense of which he was convicted."
>
> R., p. 152.

This is not any criticism of the trial court's conclusion in Major. Nor is there intended any criticism of the trial court's conclusion in Lacey Sivak's case. Nor is it to point out that the two cases standing side by side are difficult of reconciliation. It is to point out, as I intimated in comparing LePage with Osborn, as I did in Osborn II, that this Court, not just a minority thereof, needs to do its part in

completing the death sentencing procedures so as to achieve just and impartial death sentences which conform with notions of constitutionality.

There is, of course, yet another first degree murder case which bears even a stronger similarity to Sivak than Major. That case is State v. Bainbridge, No. 14544. It is inconceivable that the Court today reviews the death penalty imposed upon Sivak without any consideration of the penalty imposed upon Bainbridge. The majority opinion, while it gives mention of Sivak's co-defendant, Bainbridge, in connection with the trial court's § 19-2515 findings of aggravating and mitigating factors, Part II B of the majority opinion, wholly and, perhaps deliberately, avoids any mention of the penalty meted out to Bainbridge or to the judge's § 19-2515 findings in Bainbridge. Keeping in mind that the district judge who presided at Bainbridge's trial and at his sentencing was not the same district judge who presided at Sivak's trial (a point to which I will later return, time permitting), and firmly convinced that one sentence can not be reviewed without consideration of the other, following is the disposition made at Bainbridge's sentencing:

> "The above defendant having been found guilty by a jury of the criminal offense of First Degree Murder which under the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;
>
> NOW THEREFORE the court hereby makes the following findings:
>
> 1. Conviction. That the defendant while represented by court appointed counsel was found guilty of the offense of First Degree Murder by jury verdict.
>
> 2. Presentence Report.- That a presentence report was prepared by order of the court and a copy delivered to the defendant or his counsel at least

seven (7) days prior to the sentencing hearing pursuant to section 19-2515, Idaho Code, and the Idaho Criminal Rules.

3. Sentencing Hearing.- That a sentencing hearing was held on March 5, 1982, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

4. Facts and argument found in mitigation.

(a) Defendant has no previous conviction for the crime of murder, or any crime of violence. His prior offenses are property related.

(b) Defendant has demonstrated a propensity to being manipulated and used by other criminals; and although he participated in these crimes, he would be unlikely to initiate or perpetrate such crimes on his own.

(c) Although he had the opportunity and the encouragement of the co-defendant to do so, defendant did not himself inflict any death threatening wounds on the victim.

5. Facts and Argument Found in Aggravation.

(a) The defendant Bainbridge was in agreement with the co-defendant Sivak relative to the purpose and intent of the crimes of robbery and murder as committed here.

(b) The defendant, along with his co-defendant, acted in utter disregard of human life, knowing the victim Dixie Wilson would have to die to prevent her identification of the persons who robbed her.

(c) Such victim was murdered in an extremely cruel, atrocious and heinous manner, manifesting exceptional depravity; and this defendant, by his willing presence, and participation in the robbery, aided, abetted and encouraged the commission of the murder; and made no effort to discourage or dissuade such co-defendant in the means or manner of its execution.

(d) Although only one person was murdered, the circumstances attending such murder created a threat to the lives of others, including other employees of Baird Oil Company, customers of the station robbed, and other potential witnesses of the robbery who might otherwise happen to be in its vicinity.

(e) Defendant has been previously convicted of two felony crimes.

6. Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code.

(a) The defendant knowingly created a great risk of death to many persons, for the reasons explained in paragraph 5(a), (b) and (d) above.

(b) The murder was especially heinous, atrocious and cruel, manifesting exceptional depravity, as discussed in paragraph 5(c) above.

(c) By circumstances surrounding the commission of the robbery and murder here, the defendant exhibited utter disregard for human life, as discussed in paragraph 5(c) above.

(d) The murder was one defined as murder of the first degree by 18-4003(d), Idaho Code, and was accomplished by the specific intent to cause the death of a human being as discussed in paragraph 5(a) above.

7. Reasons why death penalty was not imposed.

I find that the mitigating circumstances, particularly that defendant did not himself deliver any death threatening blows to the victim, outweigh the gravity of the aggravating circumstances here so as to make unjust the imposition of the death penalty on this defendant.

Conclusion

That the death penalty should not be imposed on the defendant for the capital offense of which he was convicted."

It is difficult, if not impossible, to reconcile the two sentences. One murderer dies; the other lives. This is a classic case of the disparity in sentencing which produced Furman and in turn led to the second series of cases four years later wherein the Supreme Court declared that Furman had been misunderstood, while Idaho in the interim destroyed death penalty sentencing procedures which would today be entirely valid according to my own reading of the "threshold theory" which the Supreme Court now retreats to in Zant v. Stephens, ___ U.S. ___ (June, 1983). I am not critical of Justice Stephens' opinion--which was expected. At the same time I agree with the view of Justice Marshall that "the States may as well be permitted to re-enact the statutes that were on the books before Furman." ___ U.S. at ___. For, as I have stated and written even prior to receiving Zant, Idaho's procedures in capital sentencing did not lead to arbitrary and capricious imposition of death sentences. Well instructed juries would

hear evidence offered in mitigation and in aggravation, and would decide between life or death. Bifurcation of the guilt phase from the penalty phase would serve to avoid undue prejudice to a defendant charged with first degree murder.

In Godfrey v. Georgia, 446 U.S. 420, 427 (1980), the Supreme Court reaffirmed that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious fashion," and at 428, "'if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.'"

Constitutionality is not merely adhering to that which is spelled out in the Constitution, Art. 1, section 7, but includes notions of fair trial and due process. This brings me to again join Justice Huntley in decrying, as we did in Creech, the wholesale use of a presentence investigator's report. Nothing is to be gained by repeating that which was written in dissent in Creech. It will, however, lift the spirits of those who believe in a fair trial and due process to be told that in Major the district judge, although he obtained and delivered to defense counsel a pre-sentence report, at the sentencing hearing, "heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel." There is contained in the Major findings nothing to intimate a belief that a trial judge is at liberty to use a pre-sentence report as admissible evidence in reaching the determination that a convicted defendant will suffer death. This, too, may pass if that district judge, and all district judges, abide by the declaration of today's majority that there was no wrong in giving consideration to an ex parte in-

terview of Sivak's accomplice--which was included in the presentence report, and by the majority is said to support finding 5(a).

It may be that I do not fully understand what is meant by "the arbitrary and capricious infliction of the death penalty." But, if I have not seen it exemplified in comparing the penalty Sivak may pay to the penalty Bainbridge will pay, then for certain I do not know what the phrase means.

Two men, Sivak and Bainbridge, were found guilty of first degree murder which was committed in the course of a planned robbery of a gas station attendant who was acquainted with both and who could have identified both individuals. The attendant, a woman but a few years older than the defendants, was stabbed twenty times and shot three times--a brutal murder if ever there was one. The two were jointly charged, as they should have been, given a preliminary hearing, and held to answer. A single information was filed charging them jointly with armed robbery, premeditated murder, and murder in committing a felony of robbery, as they should have been charged. Neither made a motion for separate trial, apparently being unable to show the prejudice required by our case law, and they should have been tried together.[4] But they were not so tried. One defendant, Bainbridge, filed an affidavit of disqualification against Judge Newhouse, who thereupon disqualified himself as to Bainbridge only, for which there may or may not be precedent in some other jurisdiction. In any event, Judge Newhouse assigned Bainbridge's trial to Judge Rowett. In that strange manner the co-defendants were not

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[4] State v. Allen, 23 Idaho 772, 131 P. 1112 (1913); State v. Huskinson, 71 Idaho 82, 226 P.2d 779 (1951); State v. Robinson, 71 Idaho 82, 226 P.2d 779 (1951); State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968). See I.C. § 19-2106, as modified by I.C.R. 14, requiring a showing of prejudice to avoid being jointly tried.

tried together as they should have been for the crimes the two of them committed, but the results of the guilt trials came out the same, as both were convicted of first degree murder. There is little doubt in my mind, after reviewing the facts and circumstances of the crimes, that had they been tried jointly and had a jury been the sentencer both would have suffered the same fate. But they were not tried together for their jointly committed crimes as they should have been, and a jury was not the sentencer as should have been the case. As it stands now, one dies and one lives. If this is not disparate sentencing, then I do not expect to ever see it.

The two co-defendants were not only bungling criminals and inept, and thus brutal murderers, but also not loyal to each other. Sivak, who testified at his trial, claimed that Bainbridge did all of the robbing and murdering while he, Sivak, was merely in the company of Bainbridge at a poor time. Bainbridge, who did not testify at his trial, gave taped statements to the investigating officers which, on his turn to talk, blamed the entire criminal activity on Sivak, Bainbridge by misadventure merely happening to be with him at the wrong time and place, as it turned out. There were no other witnesses to the crime of murder than these two defendants. The two different juries convicted both of first degree murder and robbery, Sivak testifying to his innocence, Bainbridge not taking the stand. Neither testified at the other's trial. Notwithstanding like jury verdicts the district judges involved imposed the drastically different sentences for the same crime of murder. As acknowledged in the majority opinion in Part II B, Judge Newhouse in Sivak's case made a § 19-2515 finding that "[t]he defendant dominates his co-defendant and is primarily responsible for all that occurred." The majority, notwithstanding the provisions of I.C. § 19-2827, makes

no mention of the penalty imposed in Bainbridge, and strangely does not mention the complementing findings of Judge Rowett in Bainbridge's case that "[a]lthough he had the opportunity and the encouragement of the co-defendant to do so, defendant did not himself inflict any death threatening wounds on the victim," and "that defendant did not himself deliver any death threatening blows to the victim . . . ."

Now, a large difficulty with these two cases and the disparity in penalties imposed, is an inability to see how it would make any genuine difference which of the two defendants delivered the more telling blows, knife wounds, or shots against and into their helpless victim. The cold inescapable fact is that they murdered her, and that the two district judges, neither of whom ever heard Bainbridge testify as to the circumstances of the crime, and only one who heard Sivak testify, could both to a degree exonerate Bainbridge at Sivak's fatal expense is regrettably to my mind unacceptable. Moreover, it highlights the bizarre results of having two separate trials where there should have been a single trial, and drives home the importance of adhering to jury death sentencing as is a defendant's right under the Idaho Constitution.

As briefly mentioned in the majority opinion, Part II C, "[t]he jury . . . acquitted appellant [Sivak] of Count II . . . ."

As mentioned both defendants had been charged jointly. On the morning of Sivak's trial, the prosecutor filed an amended information five minutes before court convened. This amended information named Sivak as the only defendant. The four counts remained the same except that it deleted any mention of Bainbridge. The amended information was read to the jury:

"THE CLERK: (Reading.) In the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Amended Information. The State of Idaho, plaintiff, versus Lacey M. Sivak, defendant. Jim C. Harris, prosecuting attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of said State prosecutes in its behalf in proper person, comes now into said District Court of the County of Ada and gives the Court to understand and be informed that Lacey M. Sivak is accused by this information of the crime of Count 1, robbery, felony, Idaho Code 18-6501; Count 2, murder in the first degree, felony, Idaho Code 18-4001, 03(A); Count 3, murder in the first degree, felony, Idaho Code 18-4001, 03(D); and Count 4, possession of a firearm during the commission of a crime, felony, Idaho Code 19-2520, which said crimes were committed as follows to wit:

"Count 1, that the said defendant, Lacey Sivak, on or about the 6th day of April, 1981 in the county of Ada, State of Idaho, did feloniously and by means of apparent force and fear take from the immediate presence of Dixie Wilson, an employee of the Phillips 66 gas station, certain personal property, to wit, cash money, U.S. currency, the property of the Baird Oil Company which was accomplished against the will of the said Dixie Wilson, and that the defendant pointed a gun at the said Dixie Wilson, then shot and stabbed the said Dixie Wilson to death, and taking said cash money from the said Phillips 66 gas station.

"Count 2, that the said defendant, Lacey M. Sivak, on or about the 6th day of April, 1981 in the County of Ada, State of Idaho, did willfully, unlawfully, deliberately with premeditation and with malice aforethought murder one Dixie Wilson, a human being, by shooting and stabbing the said Dixie Wilson in the head and torso thereby mortally wounding the said Dixie Wilson from which she sickened and died in the County of Ada, State of Idaho, on the 6th day of April, 1981.

"Count 3, that the said defendant, Lacey M. Sivak, on or about the 6th day of April, 1981 in the County of Ada, State of Idaho, did, in the perpetration of a robbery, a felony, kill one Dixie Wilson, a human being, by shooting and stabbing the said Dixie Wilson in the head and torso thereby mortally wounding the said Dixie Wilson from which she sickened and died in the County of Ada, State of Idaho, on the 6th day of April, 1981.

"Count 4, that the said defendant, Lacey M. Sivak, on or about the 6th day of April, 1981 in the County of Ada, State of Idaho, did carry and use a firearm, to wit, a .22 cali-

ber revolver in the commission of the crimes alleged in Counts 1, 2, or 3 above, all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State of Idaho.

"Jim C. Harris, Ada County prosecuting attorney. (End reading.)"

Sivak testified that it was Bainbridge who was the actual murderer. The jury while deliberating sent this note to the court:

"If we convict him of robbery and agree that a murder took place by one or both of the two men do we HAVE to convict him of 1st degree murder on count III, or can we convict him of second degree murder?"

R., Supp. Volume, p. 26.

thereafter returned verdicts which found Sivak not guilty as charged in count II, but guilty as charged in counts I, III and IV.

Following that verdict, the prosecutor amended the information in Bainbridge's case to two counts only, Robbery, Count I, and murder in the commission of a felony, Count II. Thus, the prosecutor for reasons of his own, not disclosed on the record, did not give the jury any opportunity to pass upon Bainbridge's guilt on the charge of premeditated murder. Sivak had been acquitted of that charge, apparently because the jury believed his testimony. The judge, however, at sentencing on "a different range of information" nevertheless held him guilty of being the actual murderer. In my view this is not a tolerable result, something that could not have happened in Idaho in pre-Furman times, and should not happen today even with the present system of sentencing. If a court can do as was here done, the legislature might as well abolish the jury function entirely--in which effort it might find some support on this Court.

For reasons stated by Justice Huntley and myself in our Creech opinions, which have been herein reaffirmed, I vehemently dissent from Part II C of the majority opinion which announces and embraces the theory of "different ranges of information." This novel doctrine, said to be based upon Woodson v. North Carolina, 428 U.S. 280 (1976), opens the doors to anything that a prosecutor can persuade a presentence investigator to incorporate into his report. Here, in Sivak's case, the majority with blatant candor approves of the "in-depth interview" of Sivak's accomplice and its inclusion in the report. This "in-depth interview" of Bainbridge, who had not yet been tried at the time Sivak was being sentenced, was not an interview but a taped police and prosecutor's interrogation of Bainbridge just three days after the murder. This interrogation occurred while Bainbridge was in custody, having been interrogated the evening before by Mr. Pfeiffer and Mr. Killeen until about 8:25 p.m. at which time he was arrested, given his Miranda rights and booked into the Ada County Jail. Presentence Report, pp. 9-10, Police Report.

The "in-depth interview" of Bainbridge found in the presentence report took place on April 9th and was conducted by Mr. Vaughn Killeen, Mr. Dee Pfeiffer from the Ada County Prosecutor's Office, John Dutcher, deputy prosecutor for Ada County, and Officer Collins of the Garden City Police Department. The transcript of the tape is 75 pages long. No purpose would be served by setting it out, other than to demonstrate the skills of the interrogators. It suffices to say that Bainbridge did, as might be expected, attempt to exonerate himself from both the robbery and the murder, and fix all blame on Sivak.[5] In the same presentence report is a four-

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[5] As mentioned, Bainbridge did not testify at either trial. At his trial the prosecution did not offer his statement in evidence--perhaps because he denied any complicity, and perhaps because of what appears to be a Miranda violation.

page unsigned and uninitialed document entitled DEFENDANT'S VERSION, following which is the following direction and admonition:

> "Use this page to tell in your own words what happened before, during and after the crime. Include how you felt at the time, if you had been drinking or using any drugs, and any other factors that may have caused you to commit the crime.
>
> "This section is VERY IMPORTANT as it will be included in the report to give the Judge and the court an opportunity to understand your side."

Following, then, is that which presumably is Sivak's post-conviction account of what transpired at the murder scene--appearing to be consistent with his testimony, and just as equally self-serving as Bainbridge's unsworn answers to police questioning. How a district judge could divine from the two sources of evidence, to wit, the sworn and unsworn statements of Sivak as against the unsworn statements of Bainbridge, who was telling the truth, if either, is beyond my powers of comprehension. As I have said, the two should have been tried at one time, and a jury should have decided their fate. I find it intolerable that for the same brutal murder which juries have found were committed by both, our system of criminal justice results in vastly differing penalties for the two offenders.

I am also greatly troubled by some of the testimony that was offered and accepted at the "live" portion of Sivak's sentencing hearing. In particular, there was little reason or justification for the prosecutor to put on the stand a Mr. Frank Sattler. His testimony, in my view, transgresses beyond that which a sentencing jury, or judge, should hear--having nothing to do with the circumstances of the crime, or the character of the defendant.[6] If any one private citizen can

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[6] "FRANK SATTLER,

be allowed to advise the sentencer to impose the death pen-

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produced as a witness at the instance of the State, having been first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION

BY MR. HARRIS:

"Q. Frank, would you state your full name, please, and spell your last name?

"A. Frank Sattler, S-a-t-t-l-e-r.

"Q. Mr. Sattler, how are you employed?

"A. I'm a director of the Oil Heat Institute for Southern Idaho and Eastern Oregon.

"Q. Okay. You reside here in Ada County, do you?

"A. I do.

"Q. Can you describe what that association is?

"A. It is an association of all the dealers in Southern Idaho in which markets petroleum products.

"Q. Were you employed in that capacity on and after April 6th of this year, 1981?

"A. I was.

"Q. Do you recall the incidents as reported in the press that occurred on April 6th, 1981 at a gas station owned by Claud Baird here in Boise?

"A. I do.

"Q. What I would like you to do, Mr. Sattler, if you would, is just describe the ramifications throughout your industry that were felt based upon that criminal act on that day.

"A. I didn't bring my notes. I don't recall the exact dates, but shortly thereafter we had a meeting at my home concerning the murder of Dixie Wilson.

"Q. What kind of people attended that meeting?

"A. Well, the Stinker service chain was represented, the Shell service station, the Husky, the American Oil--I think all the major service station owners were at the meeting.

"Q. All right. Go ahead.

"A. And at the meeting Mr. Baird briefed the people that were there on what he had found at his particular station.

"Obviously, the emotions were quite high. And the meeting progressed as to what action, if any, we could

alty, then why not fifty such witnesses? Or five hundred, or

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take to prevent future occurrences and just how we could protect our people, frankly.

"Q. What kind of feelings resulted from that crime as were evidenced by the retail dealers in Ada County at that time?

"A. Well, several of the people that were there had--their employees had expressed to them the desire to take weapons to work with them. We discussed that at length and ruled it out with the obvious intent that somebody innocent would get hurt.

"We went to the manuals to find whatever safety devices were available to us, which some have been installed, like, bullet-proof glass and the like in those stations when the teller is inaccessible to the people.

"But where the teller is accessible, we can't use that, obviously.

"Q. All right. What kind of people generally are tellers in gas stations in this community?

"A. The cashier types are primarily housewives trying to make a few extra dollars.

"Q. Would you say that they are vulnerable to this type of criminal activity?

"A. Totally vulnerable.

"Q. Mr. Sattler, if you were in a position to pass down a sentence in this case, what would that sentence be?

"A. My personal opinion?

"Q. Yes.

"A. I'd hang him.

"MR. HARRIS: That's all I have Judge."

"CROSS-EXAMINATION

BY MR. KEHNE:

"Q. Mr. Sattler, do you know anything about the facts of the case other than what was reported in the press?

"A. Nothing.

"Q. You don't know who actually killed Dixie Wilson, do you?

"A. I do not. Other than what was reported in the press and what the Court found.

"Q. Were you aware that the jury acquitted Mr. Sivak for premeditated murder?

the entire community? And, here, is it not to be legitimately presumed that the prosecutor called this particular witness knowing or believing that the witness could and would be the deciding factor when the judge made his determination. Who is to say it was not the swinging factor?

And, was it proper to place the victim's husband, Harry Wilson[7] on the stand and beseech of the judge the death

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"A. Was I aware of that?

"Q. Yes.

"A. No, I don't recall reading that.

"Q. Would that change your opinion?

"A. Negative.

"Q. You don't think it is something that should be considered?

"A. I wouldn't--I don't consider taking a human life as something that just--

"Q. He was acquitted of that, Mr. Sattler.

"MR. HARRIS: I object, Your Honor. He wasn't acquitted of that.

"THE COURT: Well, it's cross-examination. You may proceed, Mr. Kehne.

"Q. BY MR. KEHNE: About how many robberies have there been in gas stations around this valley in, say, the last three years?

"A. I don't keep the statistics on that.

"Q. How often does it happen; can you give me an approximation?

"A. I think we probably average about two a month. I think Mr. Harris probably has the statistics on that."

7 "HARRY R. WILSON
produced as a witness at the instance of the State, having been first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION

BY MR. HARRIS:

"Q. Mr. Wilson, try to make yourself as comfortable as you can there, and would you state your full name for the record.

"A. Harry R. Wilson.

penalty? I believe that it was totally wrong, and here again

"Q. Do you reside in Ada County, Mr. Wilson?

"A. Yes.

"Q. How long have you lived in Ada County?

"A. Since '69.

"Q. And how are you employed?

"A. For Baird Oil.

"Q. What do you do for them?

"A. I drive delivery truck.

"Q. Are you the same Harry Wilson who testified in the trial of this defendant, Lacey Sivak, in September?

"A. Yes.

"Q. Could you describe for the Court, please, Mr. Wilson, your family setting and general family life prior to April 6th, 1981?

"A. It was a pretty happy family life. Everything went pretty smooth. We had our disagreement, which anybody does, but it was a happy life.

"Q. How many children did you reside with at your residence with Dixie?

"A. Three.

"Q. How old are they now?

"A. 13, 12 and 9.

"Q. Who was the mother of those three children?

"A. Dixie B. Wilson.

"Q. I would like for you now to describe you family circumstances since April 6th, 1981.

"A. It has been a hard go. It's--we started out the day of the funeral.

"Their original father, of the two boys that we had, that was hers from a previous marriage, he stuck me with a custody suit. We was in court right after that, and I have been in court four--or five times over that.

"Q. Are those children still residing with you, however?

"A. Yes. I won my case with them; I've got them. And I've got one daughter that has been in psychiatric treatment ever since.

"Q. How old is she?

may have been the single precipitating factor which tipped the scales. Did Harry Wilson know, any better than the judge, who it was, Bainbridge or Sivak, who was the sole heartless murderer? Or, whether it was both who struck, stabbed, and shot her to death. I am at a loss to see from this record how Harry Wilson could know that. He would learn eventually, but not then, that a second jury at a later trial would also convict Bainbridge of that same murder--but Bainbridge at the time that the prosecutor placed Harry Wilson on the stand was yet presumably innocent. Whether Harry Wilson would later ask Bainbridge's judge to execute him, too, is another question, as is so with whether the prosecutor would exercise his discretion to call Harry Wilson and Mr. Sattler to the stand in order to urge the death penalty.

Although it is again disturbing to peruse a presentence report which again, as in Creech includes accounts of

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"A. She is nine.

"Q. Is that the natural daughter of both you and Dixie?

"A. Yes, that's our natural daughter.

"Q. Tell me about those problems. What kind of problems is she having?

"A. Well, she just -- she couldn't accept it --this. And then she's had other problems; she has been molested twice since then.

"Q. Okay.

"A. She's just -- too many things; she can't accept it.

"Her grades -- schoolwork; everything has went down. All the kids went down.

"Q. Harry, if you were in a position to pass sentence on Lacey Sivak, what would that sentence be?

"A. Death.

"MR. HARRIS: That's all I have, Judge.

"MR. KEHNE: We have nothing. Thank you."

trial proceedings, there is not present here, as there was in Creech, an editorial encouraging the death penalty, This Court, which has assumed the right to dictate that which shall be included in presentence reports, see I.C.R. 33, Idaho Judge's Sentencing Manual part V, pp. 5.1-1 to 5.2-32, should take proper steps to keep out extraneous matter, and should reconsider State v. Moore, 93 Idaho 14, 454 P.2d 51 (1969), with a concerned view to the remarks of Justice Huntley in Part II of his Creech opinion.

In State v. Moore, a non-capital case, where a defendant was seeking probation, this Court considered the extent to which it would allow the use of hearsay found included in presentence reports, and held in favor of such use on the basis that "even though it would not be admissible under the rules of evidence [it] might be of great benefit to a defendant. We hesitate to apply unduly strict procedural requirements which would operate equally to prevent defendants from marshalling hearsay and other evidence favorable to themselves." Id., p. 18 (emphasis added). It was a compassionate judgment when rendered. Fourteen years have since gone by, and recently the Court, differently constituted, has forgotten that the reason for the rule was to benefit defendants hoping for probation and rehabilitation. I very much doubt that any defendants convicted of first degree murder have ever sought probation. In non-capital cases the rule of State v. Moore has been used to the disadvantage of defendants--who would in my experience generally be better off if presentence investigation and reports were done away with. There has always been and remain yet our statutory procedure providing for the presentation of evidence in aggravation and evidence in mitigation. This has been so in pre-Furman cases, as documented in my Creech opinion. Whatever the Court decides to do

in non-capital cases, and a return to the beneficent intention of State v. Moore is in order, the Court simply cannot in any show of conscience continue to let capital sentencing be hinged on unsworn statements and other forms of hearsay. It is now clear that a capital case involves two trials. The first is to try the issue of the accused's guilt. If convicted, the second is to try the issue of the circumstances of his crime and the facets of his character. Common sense dictates that the second trial for his life is the defendant's more important trial. Can it be then that in Idaho we have a rule that while due process obtains at the guilt trial, anything goes at the second trial which determines the issue of life and death? Until recently, I had thought that removing the element of due process from the second trial was such a monstrous proposition as to be undeserving of discussion or comment. Today I find myself aligned with Justice Huntley in an effort to so convince today's unyielding majority who harken back to State v. Moore as authority for abolishing due process.

It is true that State v. Moore, in addition to safeguarding defendant's rights, relied on Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 (1949), but it is also true that thirty-four years have passed, and much has changed, particularly in the area of death penalty sentencing. If the Supreme Court of the United States, as presently constituted, can now say that it little matters that a defendant is deprived of constitutional due process when his life is the issue stake, then a great many state judges and justices are going to be both disappointed and surprised. Whatever the outcome when the validity of Williams is closely scrutinized, we who sit on the Idaho Supreme Court will strike a sound blow for good government and good criminal justice administration when we

remember that we are also sworn to uphold the Idaho Constitution and its requirements of due process and fundamental fairness. Today, as a Court, we do not do so. Presently, insofar as the United States Constitution is concerned, I believe that under it, and the many many death penalty cases of the Supreme Court, the validity of Williams has wholly eroded-- insofar as it denied that due process was involved in sentencing a man to death.

HUNTLEY, J., concurs.

HUNTLEY, J., dissenting.

I would reverse and remand for the conduct of a constitutionally proper sentencing procedure.

The sentencing procedure utilized violates both the United States Constitution and the Idaho Constitution in failing to involve the jury in the sentencing process.

The Idaho Constitution, as first approved on July 3, 1890, and as it reads today, provides in Art. 1, § 7:

> "Right to trial by jury. -- The right of trial by jury shall remain inviolate ...."

That right of trial by jury as it existed at the time our constitution was adopted provided for jury participation in the capital sentencing process. Section 17 of the Criminal Practice Act of 1864 provided in pertinent part:

> "[A]nd the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree, shall suffer death; and every person convicted of murder in the second degree, shall suffer imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life."

In other words, the jury, by determining whether the party was guilty of either first or second degree murder,

determined whether or not the death penalty would be imposed.

In Blue Note Inc. v. Hopper, 85 Idaho 152, 157, 377 P.2d 373, (1962), we stated:

> "The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution."

Accord: Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951); Christensen v. Hollingsworth, 6 Idaho 87, 53 P. 211 (1898); Comish v. Smith, 97 Idaho 89, 540 P.2d 274 (1975).

A detailed analysis of the reasons jury participation is mandated under both the Idaho and United States Constitutions is set forth in the separate dissenting opinions of Justice Bistline and myself in State v. Creech, ___ Idaho ___, ___ P.2d ___ (1983), which dissents I hereby adopt as though fully set forth herein.

BISTLINE, J., concurring in the opinion of Huntley, J.

Lockett v. Ohio, 98 S.Ct. 2954 (1978), teaches in footnote 16 that the Supreme Court specifically did not address, and so reserved for another day, contentions that the federal Constitution requires jury sentencing and that Ohio's death penalty statutory procedures impermissibly deny a defendant's right to be tried by a jury. 98 S.Ct. at 1967. Hence, it is with some concern that today I read a majority opinion of this Court which declares that "the Supreme Court has recognized, in dicta, that judge sentencing should lead to greater consistency in sentencing . . . Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976) . . . ." It is, perhaps, excusable to confuse remarks of obiter dictum with remarks of a three-member plurality. I am equally concerned that today's

majority opinion intimates that Barclay v. Florida, ___ U.S. ___ (1983), is also authority which should persuade us that jury sentencing is not mandated by the federal Constitution. My reading of that case discloses only that in Florida the jury's function is simply to recommend and the trial judge, who is the sentencer, is not bound by the recommendation. The Florida procedure is neither like our pre-Furman Idaho procedure nor like our post-Furman Idaho procedure. Rather obviously the majority's reliance on Barclay for the particular point is a grasp at something, anything, to support a declaration that "[w]e see no reason why a sentencing scheme not involving the jury should be declared unconstitutional under the United States Constitution."[1] In time the Supreme Court will recognize, as it did in Lockett, its obligation to provide guidance. ("The States now deserve the clearest guidance that the Court can provide; . . . ." Lockett at 2963.)

Meanwhile, given the meaningless and misleading intimations of today's majority opinion on an issue which this Court should meet in response to Justice Huntley's well-documented Creech opinion, and given the invalidity of our Idaho statute removing the jury as sentencer--as measured against our Idaho Constitution--I have again joined the opinion of Justice Huntley in this case as I did in Creech. The Supreme Court, however, cannot continue to reserve the question if it is to live up to the promise of Lockett. Ultimately it, and only it can make the final decision that something is basically wrong where a nation is divided amongst itself as to the use and

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[1] Today's majority again, as in Creech, offers no response of any substance.

utility of capital punishment. Can it be and should it be that in one nation a murderer in one state will be executed, whilst murderers in another state are not? Is a line the purpose of which is to define geographic boundaries of states to forever be the determining factor in determining whether a convicted murderer will live or suffer death? If that be so, then many will see that in and of itself as arbitrary and capricious if one considers the question as the national issue, which in reality it is. And assuming that it is wrong on a national basis that the punishment meted out to murderers differs according to State law, then where two murderers are convicted of the same crime committed in one state, is it not arbitrary and capricious that each is sentenced by a different judge?--a proposition to which I shall turn in my own dissenting opinion time permitting. It should be carefully noted that Judge Newhouse in sentencing Sivak could not consider the Bainbridge sentence--which had not been imposed. This Court, however, does have both, and is obligated to consider any disproportionality in Sivak's sentence as compared to that imposed in Bainbridge.

IN THE SUPREME COURT OF THE STATE OF IDAHO

NOS. 14435 and 15022

STATE OF IDAHO, Plaintiff-Respondent,	)	
v.	)	ERRATA
	)	1983 Opinion No. 118
LACEY M. SIVAK, Defendant-Appellant.	)	

In 1983 Opinion No. 118, filed August 15, 1983, the following corrections should be made:

Page 21, paragraph 2, line 5 reads: "herein reviewing § 19-2827." SHOULD READ: "here in reviewing § 19-2827."

Page 25, paragraph 2, line 11 reads: "out to Bainbridge or to the judge's § 19-2515 findings." SHOULD READ: "out to Bainbridge or of the judge's § 19-2515 findings."

Page 27, last paragraph, line 11 reads: "Stephens' opinion--which was expected." SHOULD READ: "Stevens' opinion--which was expected."

Page 33, paragraph 6, line 1 reads: "Thereafter returned verdicts which found Sivak not guilty as." SHOULD READ: "and thereafter returned verdicts which found Sivak not guilty as."

In the Supreme Court of the State of Idaho

STATE OF IDAHO,
Plaintiff-Respondent,
v.
LACEY M. SIVAK,
Defendant-Appellant.

ORDER

NO. 14435 and 15022

WHEREAS, on September 2, 1983, the Appellant filed a PETITION FOR REHEARING of the Court's Opinion in this appeal issued August 15, 1983; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING filed September 2, 1983 be, and hereby is, DENIED and the dissent on DENIAL OF PETITION FOR REHEARING by Bistline, J., shall be released as an Addendum to the principal Opinion.

IT IS FURTHER ORDERED that, inasmuch as the Court's Opinion in this appeal has become final, the Clerk of this Court shall issue a Remittitur of this appeal to the Fourth Judicial District Court, Ada County, Idaho.

DATED this 27th day of December, 1983.

For the Supreme Court

Charles R. Donaldson
Chief Justice

ATTEST: Frederick C. Lyon
Clerk

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the ORDER entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 12-27-83

FREDERICK C. LYON
Clerk
By: Suzy E. Ozmun
Deputy

IN THE SUPREME COURT OF THE STATE OF IDAHO
NOS. 14435 and 15022

STATE OF IDAHO, Plaintiff-Respondent, v. LACEY M. SIVAK, Defendant-Appellant.	)	ON DENIAL OF PETITION FOR REHEARING December 27, 1983

BISTLINE, J., dissenting from denial of petition for rehearing.

Counsel for Lacey Sivak, in his Petition for Rehearing, presents several compelling reasons why this Court should grant the petition. Among the issues presented in his petition are the following:

(1) Whether the Idaho Supreme Court has denied Sivak the opportunity to raise important constitutional questions by consolidating Case No. 15022, which appealed the refusal of the trial judge to allow Sivak the opportunity to present additional evidence in mitigation of sentencing, with Case No. 14435, which appealed a decision denying Sivak the opportunity to submit additional briefing or arguments in Case No. 15022.

(2) Whether the trial court erred in refusing to hear evidence in mitigation of Sivak's sentence on resentencing in contravention of the United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 102 S.Ct. 869 (1982).

(3) Whether this Court's procedure of vacating and remanding for resentencing, while purporting to retain jurisdiction, a procedure absolutely without precedent, and not provided for in rule or statute, was proper.

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(4) Whether this Court's proportionality review was incomplete and constitutionally defective as the majority opinion contains no specific reference to particular cases it examined. Of discussion, there is none.

(5) Whether I.C. § 19-2827 is constitutionally defective in that it apparently only requires the Court to compare death sentences with other death sentences rather than considering those cases in which an intentional killing was involved but which did not result in imposition of death.

(6) Whether I.C. § 9-255(f)(8) which this Court narrowly construed in State v. Creech in order to preserve its constitutionality could have been properly applied in Sivak's sentencing which occurred before this Court's decision in Creech.

(7) Whether a death sentence can be premised on a condition found to exist with a certainty less than beyond a reasonable doubt as I.C. § 19-2515(f)(8) allows as an aggravating circumstance that "The defendant . . . has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(8) Whether the jury instruction on criminal liability for aiding and abetting was improper when it implied that Sivak could be found guilty thereunder for possession of a firearm which is not in and of itself a crime.

(9) Whether Sivak's constitutional right to confrontation and cross-examination of witnesses was violated by the use of the unsworn and uncross-examined statement of Randall Bainbridge in a pre-sentence report for the district court's finding that "[t]he defendant dominates his co-defendant, and is primarily responsible for all that occurred," which served as a basis for the trial court's imposition of the death penalty.

(10) Whether Sivak may be punished for both robbery and for murder premised on a felony murder theory when the robbery count did not require proof of an additional fact which the murder did.

Enough of these issues are presented with excellent briefing and argument so as to at least merit consideration and discussion by the Court, and better yet, reargument.

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In the Supreme Court of the State of Idaho

STATE OF IDAHO,

Plaintiff-Respondent,

v.

LACEY M. SIVAK,

Defendant-Appellant,

and

RANDALL W. BAINBRIDGE,

Defendant.

NOS. 14435 and 15022

REMITTITUR

TO: FOURTH JUDICIAL DISTRICT COURT, COUNTY OF ADA.

The Court having announced its Opinion in this cause August 15, 1983, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required.

DATED this 27th day of December, 1983.

Frederick C. Lyon
Clerk of the Supreme Court
STATE OF IDAHO

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Remittitur entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 12/27/83

FREDERICK C. LYON Clerk

By: Marilyn Thomas Deputy

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83-6326

APPENDIX B

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

vs.

Lacey M. Sivak,

Defendant.

Case No. 10183-A

* * *

REPORT ON IMPOSITION OF DEATH PENALTY

UNDER SECTION 19-2827, Idaho Code

The court having sentenced the above defendant to death for the conviction of the offense of Murder in the First Degree,

NOW THEREFORE, the court hereby makes a report to the Idaho Supreme Court pursuant to Section 19-2827, Idaho Code, as follows:

1. Facts regarding defendant:

a. Age. 22 years.
b. Sex. Male.
c. Race. White.
d. Marital status. Single.
e. Family relationships. Mother, father, and sister.
f. Dependants. None.
g. Occupation or trade. Previously an Avon Salesman. Presently unemployed, as he is incarcerated in the Ada County Jail.
h. Educational background. G.E.D.
i. Relationship to victim of offense. Prior co-worker.

2. Name and address of counsel representing defendant.

Rolf Kehne and Klaus Weibe, Attorneys at Law, Ada County Public Defender's office, 303 West Bannock, Boise, Idaho 83702.

3. Summary of any prior convictions of defendant.

Date felony was Committed	Description of Crime
August 16, 1977	Burglary

September 2, 1977 Receiving Stolen Property
September 2, 1977 First Degree Burglary

4. Finding in support of imposition of death penalty made pursuant to Section 19-2515, Idaho Code. A copy is attached.

5. Date set for sentencing for execution, January 26, 1982, at the hour of 9:00 a.m.

Dated this 16th day of December, 1981.

Robert G. Newhouse

HON. ROBERT G. NEWHOUSE
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

DEC 1 1981

THE STATE OF IDAHO,

Plaintiff,

vs.

Case No. 10133 A

Lacey M. Sivak,

Defendant.

* * *

FINDINGS OF THE COURT IN CONSIDERING THE DEATH PENALTY UNDER SECTION 19-2515, Idaho Code

The above defendant having been found guilty of the criminal offense of Murder of the First Degree, which under the law authorizes the imposition of the death penalty; and the court having ordered a pre-sentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW THEREFORE the court hereby makes the following findings:

1. Conviction. That the defendant, while represented by court appointed counsel, Rolf Kehne and Klaus Weibe, was found guilty of the offense of Murder of the First Degree by jury verdict.

2. Pre-sentence Report. That a pre-sentence report was prepared by order of the court and delivered to the defendant or his counsel at least 7 days prior to the sentencing hearing pursuant to 19-2515, Idaho Code, and the Idaho Criminal Rules.

3. Sentencing Hearing. That a sentencing hearing was

held on December 14, 1981, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the court heard relevant evidence in aggravation and mitigation of the offense, and arguments of counsel.

4. Facts and Argument Found in Mitigation.

a. That the defendant is a young man, 22 years of age, likely subject to some type of rehabilitation. This rehabilitation will be extremely difficult. It has been tried.

b. That the defendant is readily employable, and is capable of being further trained and educated. He is ambitious and is of normal intelligence.

c. That the defendant is a good member in his church organization, was very active in this church, and has the good will of the membership.

d. That the defendant, by the findings of the jury, was not guilty of premeditated murder.

e. That, after the defendant was paroled from prison, he received no negative parole reports, was then placed on minimum parole supervision, and, as a result, received an early discharge from parole on August 25, 1980.

5. Facts and Argument Found in Aggravation.

a. That the defendant committed this murder during the commission of a gas-station robbery. This robbery was done with a co-defendant, one Randall Bainbridge, at the defendant's prior place of employment. This defendant had ill will toward his ex-employer. The defendant dominates his co-defendant, and is primarily responsible for all that occurred.

b. That the defendant planned committing serious crimes, such as robbery, as shown by his stealing a pistol from his mother's employer at her place of employment.

c. That the defendant knew the victim, bore her animosity, and realized she could identify him if she were left alive after this robbery.

d. That the defendant himself used this pistol in the commission of this murder. After the robbery, and the killing, the defendant hid the pistol in a mini-warehouse, in his car, both being under his control.

e. That both this defendant, and his co-defendant, were large strong powerful men, and the victim, a woman, was completely under their physical domination. She had no chance!

f. That the defendant was previously convicted of three felonies, to-wit:

Date felony was committed:	Description of Crime:
August 16, 1977	Burglary
September 2, 1977	Receiving Stolen Property
September 2, 1977	First Degree Burglary

for which he was sentenced, on each charge, on December 12, 1977, to 5 years, indeterminate sentences to be served concurrently, with the court retaining jurisdiction of these sentences for 120 days. The defendant was initially placed at the North Idaho Correctional Institute at Cottonwood, Idaho, a minimum security facility. The defendant failed to respond to this program, and was subsequently removed on January 27, 1978, to the mainsite in Ada County, Idaho. On April 11, 1978, jurisdiction was extended for an additional sixty days. The defendant was ultimately paroled on June 27, 1979, and placed under the supervision of Arlene Baldwin, Probation and Parole. His discharge from parole was August 25, 1980, a few months before this brutal robbery and murder.

7. That the defendant was not under the influence of any mind controlling substance during this incident. He apparently

was mentally cool and collected, with the murder being an intentional rational act.

6. Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code.

These aggravating circumstances are all found by this court to be beyond a reasonable doubt.

a. The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity. (sub-paragraph #5) The defendant actively participated in continually stabbing the victim, approximately twenty times, and shooting her, approximately five times, while sexually molesting her at the same time. The victim tragically remained alive, during this torturous ordeal, for a long period of time thereafter.

b. By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. (sub-paragraph #6) No one could have killed the victim in this manner and had any possible regard for the life of Dixie Wilson.

c. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code,(d), to-wit: committed in the perpetration of a robbery, and it was accompanied with the specific intent to cause the death of a human being. After the robbery commenced the defendant realized the victim could identify him if she were left alive after this robbery.

d. The defendant, both by prior conduct and conduct in the commission of the murder at hand, has exhibited a ~~propensity to commit~~ murder which will probably constitute a continuing threat to society. It is impossible for this court to believe that society will ever be safe while this defendant remains mobile and active.

7. Reasons Why Death Penalty Was Imposed.

This defendant actively participated in the brutal savage slaying and sexually molesting of a woman while at the same time butchering her alive. By so doing Lacey M. Sivak has forfeited his rights to life, society must be protected, and his peace should be made with his maker - not with this Court.

The Court finds that the mitigating circumstances do not outweigh the gravity of the aggravating circumstances so as to make unjust the imposition of the death penalty.

That the death penalty should be imposed on the defendant for the capital offense of which he was convicted.

Dated this 16th day of December, 1981.

Robert G. Newhouse

HON. ROBERT G. NEWHOUSE
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FILED
A.M. 4:12
DEC 7 1981
By Deputy

THE STATE OF IDAHO,
Plaintiff,

vs.

LACEY M. SIVAK,
Defendant.

Case No. 10183 A

JUDGMENT OF CONVICTION

This being the time fixed by the Court for pronouncing sentence upon the defendant, the Court noted the presence of Jim C. Harris, Prosecuting Attorney of Ada County, Idaho, Lacey M. Sivak, the defendant, and Rolfe Kohne and Klaus Weibe, attorneys for the defendant, in court.

The defendant was duly informed as follows:

1. Of the Information filed against the defendant for the crimes of ROBBERY, I.C. 18-6501, MURDER IN THE FIRST DEGREE, I.C. 18-4001, 03 (d), and POSSESSION OF A FIREARM DURING THE COMMISSION OF BOTH CRIMES, I.C. 19-2520, committed on or about April 6, 1981.

2. Of the defendant's conviction, by a jury, on these charges, September 29, 1981.

The Court, then, after these convictions, ordered a pre-sentence investigation, and convened a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offenses, in accordance with 19-2515 of the Idaho Code, and Rule 33.1 of the Idaho Criminal Rules; and the Court having entered written findings setting forth the statutory aggravating circumstances found, and the mitigating circumstances considered; and the Court having found that the

mitigating circumstances found do not outweigh the aggravating circumstances found so as to make unjust the imposition of the death penalty; and the Court having found no legal cause or reason why judgment and sentence should not be pronounced against the defendant at this time; does render its judgment of conviction as follows, to-wit:

That, whereas, the defendant having been convicted in this Court of the crimes of Robbery, I.C. 18-6501, Murder in the First Degree, I.C. 18-4001, 03 (d), and Possession of a Firearm During the Commission of Both Crimes, I.C. 19-2420,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED That the defendant, Lacey M. Sivak, is guilty of the crimes of Robbery, I.C. 18-6501, and Possession of a Firearm During the Commission of this crime, I.C. 19-2520, and that he be sentenced to the Idaho State Board of Correction, under the provisions of 19-2513 A of the Idaho Code, for the crime of Robbery, to the custody of the State Board of Correction for a fixed period of time for the rest of his natural life, and for the crime of Possession of a Firearm During the Commission of this Crime, in addition to the sentence imposed for Robbery, to be served consecutively, to the custody of the State Board of Corrections, for a fixed period of time of not more than 15 years; and that he be remanded to the custody of the Sheriff of this County to be delivered to the proper agent of the State Board of Correction in execution of this sentence. The defendant is to receive credit for the 205 days spent in the Ada County Jail prior to entry of this Judgment. Any bail is exonerated.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED That the defendant, Lacey M. Sivak, is guilty of the crime of Murder in the First Degree, I.C. 18-4001, 03(d), and Possession of a Firearm During the Commission of this Crime, I.C. 19-2520, and that he be sentenced on these charges to be punished by death by the Idaho

State Board of Correction, on January 26, 1982 at 9:00 a.m., in the manner prescribed by law, and that he be remanded to the custody of the Sheriff of this county to be delivered to the proper agent of the State Board of Correction in execution of this sentence.

Dated this 16th day of December, 1981.

Robert G. Newhouse

HON. ROBERT G. NEWHOUSE
District Judge

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-respondent, v. LACEY M. SIVAK, Defendant-appellant.	)	10183 A Supreme Court No. 14435 ORDER

FILED A.M. P.M. MAR 24 1983 JOHN BASTIDA, CLERK BY DEPUTY

In the above-entitled cause, defendant Sivak was convicted by a jury of a charge of first degree murder, a charge of robbery, and a charge of possession of a firearm during the commission of a felony. In accordance with I.C. § 19-2515, the district court conducted a hearing into mitigating or aggravating circumstances and thereafter on the 16th day of December, 1981, the district court purported to impose the death sentence upon the defendant; and

The cause being before this Court both on appeal by the defendant and also pursuant to the automatic review of death sentences mandated by I.C. § 19-2827; and

It appearing from the record, without any contention otherwise by the respondent State of Idaho, that contrary to the requirements of I.C. § 19-2503 and I.C.R. 43(a), the trial judge purported to impose sentence in the absence of defendant and his counsel and without the presence of defendant and his counsel in open court, but rather by means of a written imposition of a sentence of death,

NOW, THEREFORE, IT IS HEREBY ORDERED that the sentence of death imposed upon the defendant in the absence of the defendant

and his counsel be and the same hereby is vacated and the cause is remanded to the Honorable Robert Newhouse, District Judge of the Fourth Judicial District of the State of Idaho, Ada County, who shall within fourteen (14) days from the date of this Order, in open court and in the presence of defendant and his counsel, enter a judgment of conviction and impose such sentence upon the defendant Lacey M. Sivak as to the said District Judge may appear to be just and appropriate. In the event that said Judge shall impose a sentence of death, a warrant therefor shall issue in accordance with I.C. § 19-2705; and

IT IS FURTHER ORDERED that on the completion of said proceedings a transcript thereof shall be immediately prepared, delivered and lodged with this Court not later than five (5) days from the completion of said proceedings; and

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this cause pending compliance with this Order and thereafter will determine the issues on appeal; and

IT IS FURTHER ORDERED that this Order be served upon the Honorable Robert G. Newhouse, District Judge of the Fourth Judicial District, the Office of the Attorney General, and counsel for the defendant.

DATED this 24th day of March, 1983.

By Order of the Supreme Court

Corinne R. Sheldon
Chief Justice

ATTEST: Jacqueline Lyon
Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FILED
A.M. 11:00 P.M.
MAR 18 1983
JOHN BASTIDA, CLERK
By Mary A. Burgess

THE STATE OF IDAHO Plaintiff, vs. LACEY M. SIVAK Defendant,	Case No. 10183 ORDER

It appearing to this court that the court's prior attempted sentencing of the defendant requires a further hearing in open court, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant, Lacey M. Sivak, and his counsel, appear in front of this court on Monday, April 4, 1983, at 9:00 A.M. for sentencing in accordance with newly enunciated law.

Dated this 18th day of March, 1983.

Robert G. Newhouse

ROBERT G. NEWHOUSE
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,
Plaintiff,
vs.
LACEY M. SIVAK,
Defendant.

Case No. 10183 A

JUDGMENT OF CONVICTION

This being the time fixed by the Court for pronouncing sentence upon the defendant, the Court noted the presence of Greg Bower, Prosecuting Attorney for Ada County, Idaho, Lacey M. Sivak, the defendant, and David Niven, attorney for the defendant, in court.

The defendant was duly informed as follows:

1. Of the Information filed against the defendant for the crimes of ROBBERY, I.C. 18-6501, MURDER IN THE FIRST DEGREE, I.C. 18-4001, 03 (d), and POSSESSION OF A FIREARM DURING THE COMMISSION OF BOTH CRIMES, I.C. 19-2520, committed on or about April 6, 1981.

2. Of the defendant's conviction, by a jury, on these charges, September 29, 1981.

The Court, then, after these convictions, ordered a pre-sentence investigation, and convened a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offenses, in accordance with 19-2515 of the Idaho Code, and Rule 33.1 of the Idaho Criminal Rules; and the Court having entered written findings setting forth the statutory aggravating circumstances found, and the mitigating

circumstances considered; and the Court having found that the mitigating circumstances found do not outweigh the aggravating circumstances found so as to make unjust the imposition of the death penalty; and the Court having found no legal cause or reason why judgment and sentence should not be pronounced against the defendant at this time; does render its judgment of conviction as follows, to-wit:

That, whereas, the defendant having been convicted in this Court of the crimes of Robbery, I.C. 18-6501, Murder in the First Degree, I.C. 18-4001, 03 (d), and Possession of a firearm during the commission of both crimes, I C. 19-2420.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED That the defendant, Lacey M. Sivak, is guilty of the crimes of Robbery, I.C. 18-6501, and Possession of a Firearm during the commission of this crime, I.C. 19-2520, and that he be sentenced to the Idaho State Board of Correction, under the provisions of 19-2513 A of the Idaho Code, for the crime of Robbery, to the custody of the State Board of Correction for a fixed period of time for the rest of his natural life, and for the crime of Possession of a Firearm during the commission of this crime, in addition to the sentence imposed for Robbery, to be served consecutively, to the custody of the State Board of Corrections, for a fixed period of time of not more than 15 years; and that he be remanded to the custody of the Sheriff of this County to be delivered to the proper agent of the State Board of Correction in execution of this sentence. The defendant is to receive credit for the 205 days spent in the Ada County Jail prior to entry of this Judgment. Any bail is exonerated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the defendant, Lacey M. Sivak, is guilty of the crime of Murder in the First De ree, I.C. 18-4001, 03(d), and Possession of a Firearm during the commission of this crime, I.C. 19-2520, and that he be

sentenced on these charges to be punished by death by the Idaho State Board of Correction, on May 20, 1983 at 9:00 A.M., in the manner prescribed by law, and that he be remanded to the custody of the Sheriff of this county to be delivered to the proper agent of the State Board of Correction in execution of this sentence.

Dated this 4th day of April, 1983.

Robert G. Newhouse

HON. ROBERT G. NEWHOUSE
District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR
THE COUNTY OF ADA

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	10183
	)	
vs.	)	INFORMATION
	)	
LACEY M. SIVAK and RANDALL W. BAINBRIDGE,	)	
	)	
Defendants.	)	

JIM C. HARRIS, Prosecuting Attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of said State, prosecutes in its behalf, in proper person comes now into said District Court of the County of Ada, and gives the Court to understand and be informed that LACEY M. SIVAK and RANDALL W. BAINBRIDGE

X(s) (are) accused by this Information of the crime of Ct.I-ROBBERY, Felony, I.C. 18-6501; Ct.II-MURDER IN THE FIRST DEGREE, Felony, I.C. 18-4001, 03; and Ct.III-POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME, Felony, I.C. 19-2520;

having been duly brought before a magistrate on the 1st day of May, 1981, and having had their preliminary hearing therein upon said charge(s) by said magistrate thereupon held to answer to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, to said charge(s), which said crime(s) was committed as follows, to-wit:

COUNT I

That the said defendants, LACEY M. SIVAK and RANDALL W. BAINBRIDGE, on or about the 6th day of April, 1981, in the County of Ada, State of Idaho, did feloniously and by means of apparent force and fear, take from the immediate presence of Dixie Wilson, an employee of the Phillips 66 gas station, certain personal property, to-wit: cash money, U.S. currency, the property of the Baird Oil Company, which was accomplished against the will of the said Dixie Wilson, in that the defendants pointed a fun at the said Dixie Wilson, demanded the money, then shot and stabbed the said Dixie Wilson to death and taking said cash money from the said Phillips 66 gas station.

COUNT II

That the said defendants, LACEY M. SIVAK and RANDALL W. BAINBRIDGE, on or about the 6th day of April, 1981, in the County of Ada, State of Idaho, did in the perpetration of a robbery, or in the alternative, did wilfully, unlawfully, deliberately with premeditation and with malice aforethought, kill and murder one Dixie Wilson, a human being, by shooting and stabbing the said Dixie Wilson in the head and chest, thereby mortally wounding the said Dixie Wilson from which she sickened and died in the County of Ada, State of Idaho, on the 6th day of April, 1981.

COUNT III

That the said defendant, LACEY M. SIVAK, on or about the 6th day of April, 1981, in the County of Ada, State of Idaho, did carry and use a firearm, to-wit: a .22 caliber revolver, in the commission of the crimes alleged in Counts I and II above.

All of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State of Idaho.

JIM C. HARRIS
Ada County Prosecuting Attorney

Filed May 7, 1981

JIM C. HARRIS
Ada County Prosecuting Attorney
103 Courthouse
Boise, Idaho 83702
Telephone: 384-8750

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,
Plaintiff,
vs.
LACEY M. SIVAK,
Defendant.

Case No. 10183

INFORMATION, PART II

JIM C. HARRIS, Prosecuting Attorney in and for the County of Ada, State of Idaho, who, in the name of and by the authority of said State, prosecutes in its behalf, in proper person, comes now before the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, and gives the Court to understand and to be further informed that, as Part II of the Information on file herein, the defendant, LACEY M. SIVAK, is a persistent violator of the law, in that the defendant has heretofore been convicted of the following felonies, to-wit:

I.

That the said defendant, LACEY M. SIVAK, on or about the 14th day of November, 1977, was convicted of the crime of Burglary in the First Degree, a felony, in the County of Ada, State of Idaho, by virtue of that certain Judgment of Conviction made and entered by Judge Robert M. Rowett.

II.

That the said defendant, LACEY M. SIVAK, on or about the 12th day of December, 1977, was convicted of the crime of Burglary in the First Degree, a felony, in the County of Ada, State of Idaho, by virtue of that certain Judgment of Conviction made and entered by Judge Robert M. Rowett.

III.

That the said defendant, LACEY M. SIVAK, on or about the 12th day of December, 1977, was convicted of the crime of Burglary in the First Degree, a felony, in the County of Ada, State of Idaho, by virtue of that certain Judgment of Conviction made and entered by Judge Robert M. Rowett.

WHEREOFRE, the said defendant, having been convicted previously of three felonies, should be considered a persistent violator of the law, and should be sentenced accordingly, pursuant to Idaho Code, Section 19-2514, upon conviction of the charge contained in Part I of the Information.

DATED this 16 day of May, 1981.

JIM C. HARRIS
Ada County Prosecuting Attorney

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR

THE COUNTY OF ADA

NO. _____
A.M. 9:30 P.M.
SEP 2 1981
BOISE
BY Linda Longstreet

THE STATE OF IDAHO,)
)
Plaintiff,)
)
vs.)
)
LACEY M. SIVAK,)
)
Defendant .)

AMENDED
INFORMATION

JIM C. HARRIS, Prosecuting Attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of said State, prosecutes in its behalf, in proper person comes now into said District Court of the County of Ada, and gives the Court to understand and be informed that LACEY M. SIVAK

(is) ~~(are)~~ accused by this Information of the crime of Ct.I-ROBBERY, Felony, I.C. 18-6501; Ct.II-MURDER IN THE FIRST DEGREE, Felony, I.C. 18-4001, 03(a); Ct.III-MURDER IN THE FIRST DEGREE, Felony, I.C.18-4001, 03(d); and Ct. IV-POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME, Felony, I.C. 19-2520,

~~having been duly brought before a magistrate on the xxxx day of xxxxxxxxxxxxxxxxxx xxxxx and xxxxxxxxxxxxxxxxxxxxxxxxxxx xxx xxxx preliminary hearing thereon upon said charge(s) by said magistrate thereupon held to answer to the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada to said charge(s)~~, which said crime(s) ~~was~~ were committed as follows, to-wit:

COUNT I

That the said defendant, LACEY M. SIVAK, on or about the 6th day of April, 1981, in the County of Ada, State of Idaho, did feloniously and by means of apparent force and fear, take from the immediate presence of Dixie Wilson, an employee of the Phillips 66 gas station, certain personal property, to-wit: cash money, U.S. currency, the property of the Baird Oil Company, which was accomplished against the will of the said Dixie Wilson, in that the defendant pointed a gun at the said Dixie Wilson, then shot and stabbed the said Dixie Wilson to death and taking said cash money from the said Phillips 66 gas station.

COUNT II

That the said defendant, LACEY M. SIVAK, on or about the 6th day of April, 1981, in the County of Ada, State of Idaho, did wilfully, unlawfully, deliberately with pre-meditation and with malice aforethought, murder one Dixie Wilson, a human being, by shooting and stabbing the said Dixie Wilson in the head and torso, thereby mortally wounding the said Dixie Wilson from which she sickened and died in the County of Ada, State of Idaho, on the 6th day of April, 1981.

COUNT III

That the said defendant, LACEY M. SIVAK, on or about the 6th day of April, 1981, in the County of Ada, State of Idaho, did, in the perpetration of a robbery, a felony, kill one Dixie Wilson, a human being, by shooting and stabbing the said Dixie Wilson in the head and torso, thereby mortally wounding the said Dixie Wilson from which she sickened and died in the County of Ada, State of Idaho, on the 6th day of April, 1981.

(see attached sheet for Count IV)

All of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State of Idaho.

JC Harris

JIM C. HARRIS
Ada County Prosecuting Attorney

COUNT IV

That the said defendant, LACEY M. SIVAK, on or about the 6th day of April, 1981, in the County of Ada, State of Idaho, did carry and use a firearm, to-wit: a .22 caliber revolver, in the commission of the crimes alleged in Counts I, II or III above.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

at 11:24 A.M.

SEP 2 1981

By Brenda Knightlinger, Deputy

THE STATE OF IDAHO, Plaintiff	
vs	Case No. 10183A
LACEY M. SIVAK, Defendant.	VERDICT

ROBBERY

We, the jury in the above entitled case, find the defendant Guilty.

Robert Hayslett
Foreman

9-29-81
Date

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NO. 11224 FILED P.M.

SEP 29 1981

By Linda Longstreet

THE STATE OF IDAHO,
Plaintiff,
vs.
LACEY M. SIVAK,
Defendant.

Criminal Case No. 10183A

VERDICT

MURDER IN THE FIRST DEGREE, Count II

We, the jury in the above entitled case, find the defendant Not Guilty.

Foreman

9-29-81
Date

VERDICT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SEP 29 1981

By Sherrie Longstreet

THE STATE OF IDAHO, Plaintiff	
vs	Case No. 10183A
LACEY M. SIVAK, Defendant	VERDICT

POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME, to-wit: Murder in the First Degree, Count II

We, the jury in the above entitled case, find the defendant Not Guilty.

Robert Haight
Foreman

9-29-81
Date

VERDICT
COUNT II

Filed September 29, 1981

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NO. _____

A.M. 11:24 FILED P.M. _____

SEP 29 1981

JOHN [illegible] CLERK

BY Linda L. Harrington Deputy

THE STATE OF IDAHO Plaintiff vs LACEY M. SIVAK, Defendant	Case No. 10183A VERDICT

MURDER IN THE FIRST DEGREE, Count III

We, the jury in the above entitled case, find the defendant Guilty.

Robert Angstadt
Foreman

9-29-81
Date

VERDICT
COUNT III

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FILED

A.M. 11:24 P.M.

SEP 29 1981

By Glenda Longstreet

THE STATE OF IDAHO Plaintiff vs LACEY M. SIVAK, Defendant	Case No. 10183A VERDICT

POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME, to-wit: Robbery

We, the jury in the above entitled case, find the defendant Guilty.

Robert Hoagland
Foreman

9-29-81
Date

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FILED

A.M. 11:24

SEP 29 1981

By Linda Longhurst

THE STATE OF IDAHO Plaintiff vs LACEY M. SIVAK, Defendant	Case No. 10183A Special Findings

POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME, to-wit: Murder in the First Degree, Count III

We, the jury in the above entitled case, find the defendant, Guilty.

Robert Hayes
Foreman

9-29-81
Date

INSTRUCTION

Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

All murder which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

Any murder committed in the perpetration of, or attempt to perpetrate robbery, is murder of the first degree.

All other kinds of murder are of the second degree.

Should you find the defendant guilty of the crime of murder, you must determine the degree thereof, and place that determination in an appropriate verdict.

INSTRUCTION

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense of either first or second degree murder he may, however, be found guilty of any lesser included offense, the commission of which is necessarily included in such offense, if the evidence is sufficient to establish his guilt beyond a reasonable doubt.

The offense of either first or second degree murder necessarily includes the lesser included offense of manslaughter.

Should you find the defendant guilty of either first or second degree murder you need not consider whether or not he is guilty of the lesser included offense of manslaughter.

INSTRUCTION

The State has charged the defendant with the First Degree Murder of one person, namely, Dixie Bell Wilson. It has done that by alleging in Counts II and III distinct and separate theories as to how that murder was committed. In Count II the State alleges the First Degree Murder was committed by wilfully, unlawfully, deliberately, with premeditation and with malice aforethought murdering one Dixie Bell Wilson. In Count III the State alleges the Murder was committed in the perpetration of a robbery. You may find the Defendant guilty of either one or both of these counts. You may find the defendant not guilty of either one or both of these counts. If you find the defendant not guilty of both counts of First Degree Murder as charged in Counts II and III you must then decide if the defendant is guilty of the crime of Murder in the Second Degree, a lesser included crime under Count II.

INSTRUCTION:

All persons concerned in the commission of a crime, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed, and are equally guilty thereof.

INSTRUCTION

In a crime, or crimes, such as that charged, there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

If we convict him of robbery and agree that a murder took place by one or both of the two men do we HAVE to convict him of 1st degree murder on count III, or can we convict him of second degree murder?

The instructions you have cover this question. You may continue deliberating under these instructions.

Judge Newhouse

Bob Haight
8/28/81

10:30 pm
8/28/81

NOTE FROM JURY
AND COURT'S REPLY

Dated September 28, 198

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HON. ROBERT G. NEWHOUSE
DISTRICT JUDGE

September 29, 1981
DATE

COURT MINUTES

The State of Idaho,

Plaintiff,

vs.

Case No. 10183A

LACEY M. SIVAK,

Defendant.

Appearances: Tape No. 0337 0159 thru 0231

Jim C. Harris
Ada County Prosecuting Attorney
Counsel for State

Rolf Kehne, Klaus Weibe
Ada County Public Defenders
Counsel for Defendant

9:10 a.m. Jury present in courthouse to continue deliberations.

10:30 a.m. Jury informs bailiff, Earl Cohick, they have reached a verdict.

11:24 a.m. Court convened. Jury present, roll call waived. Defendant present, in custody.

Bailiff tenders verdicts to Judge.
Clerk reads verdicts to defendant.
Clerk polls jury as per court's request.

Court orders pre-sentence investigation.
State moves to dismiss Part II, persistant violator.

Court dismisses persistant violator charge, and continues this matter to October 30, 1981 at 1:30 p.m. for the pre-sentence report and to set hearing in this matter.

Defense counsel moves for a jury trial of mitigating and litigating circumstances.

Court requests defense set a hearing in this matter.

Court thanks jurors and excuses them permanently.

Defendant REMANDED.

VERDICT: Murder in the First Degree, Ct. III - GUILTY.
VERDICT: Robbery, GUILTY.
VERDICT: Possession of a Firearm during the Commission of a Crime, to-wit: Murder in the First Degree, Ct III - GUILTY.
VERDICT: Possession of a Firearm during the Commission of a Crime, to-wit: Robbery - GUILTY
VERDICT: Murder in the First Degree, Ct II - NOT GUILTY
VERDICT: Possession of a Firearm during the Commission of a Crime, to-wit: Murder in the First Degree, Count II - NOT GUILTY.

APPENDIX D

Killeen: Today's date is April 9th, 1981; it is approximately noon. Present are Randy Bainbridge; Mike Collins from Garden City Police Department; myself, Vaughn Killeen; and, Dee Pfeiffer, from the Ada County Prosecutor's Office; and, John Dutcher, Deputy Ada County Prosecutor. The reason we are back in here, Randy, is that we just want to go over a few clarifying things that you might be able to help us with. We got the gun last night where you said it was, the Derringer, the bullets and those kind of things. We also went over to your house and we talked to your mother, by the way. Has your mother talked to you yet?

Bainbridge: No.

Killeen: How about your, how about_____, has she talked to you? Look it - we would like to go over a couple of things and not go through the whole thing again because we have already done that, but we would like to go over a couple of more details, and you don't have to if you don't want to obviously. We got the same rights form that we talked about yesterday and if you would, we would like to ask you a couple of more questions; we would like you to take a look at the rights form and go through that again if you would.

Bainbridge: Well I understand the rights.

Killeen: I know you know you understand your rights and you do, but it is one of those things that we have to go through every time. You understand that?

Bainbridge: Yeah.

Killeen: Okay, why don't you take this and read your rights and go

D1

ahead and initial, just like you did yesterday. If you have any questions also, again Randy, let me know.

Bainbridge: Uh-huh (yes)

Killeen stepped out of room for a minute, Pfeiffer asked Bainbridge for coffee, Dutcher went for coffee.

Bainbridge: Can I have an attorney present? Cause I don't want to have none of this on my, it's already on my record I guess.

Pfeiffer: Well, let me clarify while we are here. We are here to talk to you about the incident that we have already talked about; about Dixie Wilson, and if you have an attorney here, then we aren't going to be able to talk to you.

Bainbridge: Okay.

Pfeiffer: We would like to talk to you, but this is entirely up to you. We're not going to yell at you and get mad...

Bainbridge: I just want to get it all off my shoulders cause I did sleep better last night.

Pfeiffer: Good.

Bainbridge: I told someone and I feel it was my right to do it because I'm not a dirty person.

Pfeiffer: You know the interesting thing about it, you know you hear all these things about your rights, you know, you have the right to remain silent, but you do have the right also to talk to you if you want to. And you exercised that right.

Pfeiffer: Randy indicated that he might want to have an attorney or asked if he could have one and I explained to him that

he most assuredly can have an attorney but that if there is an attorney present here right now, we won't be able to talk to him...

Bainbridge: I don't understand that too well.

Collins: Having these rights in mind, you either do want to talk to me or you do not.

Bainbridge: I do want to talk to somebody.

Collins: Okay, so why don't you circle do, okay, that's what you want to do, and then initial there.

Killeen: Randy, you understand what Dee Pfeiffer said?

Pfeiffer: I explained to him that we had some more questions about the same incident, about the death of Dixie Wilson, and that we need to clarify some things that we already talked about, and that he didn't have to talk to us. You understand that, don't you Randy? You don't have to talk to us.

Bainbridge: This is going to be used against me.

Killeen: Well, as the form says, anything you say can potentially be used against you. You know that.

Bainbridge: Yeah.

Killeen: You know that; we all know that. That's the purpose of the rights. You can invoke your rights at any time, even after you start talking you can invoke your rights. The rights are the guarantee of the constitutional protection if you so choose to invoke your rights.

Bainbridge: That's why I'm admitting to saying anything because I'll admit to it all...

Killeen: Just the truth.

Bainbridge: Yeah.

Killeen: That's all we want.

Bainbridge: And, but it has nothing against me. I wasn't even supposed to be there.

Killeen: Okay, those things....

Bainbridge: I wish to God that I wasn't.

Killeen: But the point that we are trying to make is that you are freely talking to us right now. Okay?

Bainbridge: Yeah.

Killeen: Okay. And you do understand your rights?

Bainbridge: Yes.

Killeen: Okay.

Bainbridge: I'm frightened.

Killeen: I can understand that you are frightened.

Bainbridge: I've been frightened for the past few days.

Killeen: What we would, we would like some clarification on a couple of things, and some of these things are implicit and we know you have to go over these things. Number one, I would like to start off with, when this was all over and you were leaving the service station, why don't you describe precisely how you guys left; who got in the car; one of you got in the car, one of you walked away and was picked up; or, if you both got in the car immediately; if you drove the car; whatever the details were, just describe precisely when you were leaving. If anybody was around...

Bainbridge: Oh, when we was leaving on the way out, I says, let's get out of here, I don't want nothin to do with it. So he said allright, and we went out to the car and I says

well I just want to fix my van because t[redacted]t was the whole major idea of it. Well, I didn't, we didn't get it fixed right off there; we went down...

leen: No, what I'm saying to you, did you get in the car and drive away?

inbridge: No, I didn't drive; I rode with him cause he was going to take me to the van.

lleen: Did you, okay, I'm going to ask you a pointed question here...did you walk away from the scene or run away from the scene, the location of the gas station and then he picked you up later?

ainbridge: No.

illeen: You drove away in the car with him?

ainbridge: I rode with him, yes. He was taking me up to fix the van. We went down to the house, picked up the starter at my house...

Killeen: Picked up the starter?

Bainbridge: My starter. I needed to get a new starter.

Killeen: Did you know; when did you realize, first realize that you needed a new starter for your van?

Bainbridge: Oh, about two to four days before that.

Killeen: So you knew that morning that you needed a new...

Bainbridge: I was going to get one.

Killeen: You needed to buy a new starter.

Bainbridge: Yeah.

Killeen: And you, you mean your van needed a new starter put into it before it would even go?

Bainbridge: Yeah.

Killeen: And so, was that your motivation that morning, to buy the new starter?

Bainbridge: Yeah, I was going to go get one.

Killeen: Okay. Where did you...

Bainbridge: I was going to see what the trade-in was on the old one; that's why I took it with me.

Killeen: Okay. Where did you go?

Bainbridge: That I couldn't recall. I have the receipt at home.

Killeen: Why don't you describe where you went.

Bainbridge: Okay....

Killeen: To the best of you ability...

Bainbridge: It was over; I can't.

Killeen: Garden City? Boise?

Bainbridge: I don't think it was in Garden City.

Killeen: Which direction did you go on Chinden? To go to this place?

Bainbridge: We went to the right; we went away from Boise.

Killeen: Okay, you went to the right, down Chinden?

Bainbridge: Yeah. Where that church was at. Over by where that church was at. There was an auto place over there, a few blocks.

Killeen: What church?

Bainbridge: The church that he went to.

Killeen: Oh, the church that he went to?

Bainbridge: Yeah.

Killeen: Are we talking about Cole Village? A little shopping center?

Bainbridge: No, it isn't a shopping center there, just a little store where you buy used parts, stuff like that. (107)

Killeen: Maybe that's on Ustick.

Bainbridge: Well, right by my front door, going out the front door, there are those lights by the door...well behind one of them is that yellow little slip of paper sitting right there.

Killeen: Oh, out front; not even inside the house?

Bainbridge: Well, it was inside the house, but I'm saying, in the house; going outside, by the light there is a little...

Killeen: How much did that item cost?

Bainbridge: It was about thirty-seven, is the best I can remember.

Killeen: Who paid for it?

Bainbridge: He give me the money to put in it, put on it,

Killeen: Where did he get the money?

Bainbridge: I don't know, he had it, he had it with him.

Killeen: He had it with him?

Bainbridge: That's what I presumed he got from the gas station.

Killeen: Part of the money he took from the register?

Bainbridge: (indiscernible)

Killeen: Did he take all of the money out of the register? Or did you? Well, see, we've got a lot of latent prints and we are in the process right now of checking them.

Bainbridge: Ain't none of mine on there.

Killeen: And that's...

Bainbridge: I didn't do nothing.

Killeen: Well, that's what I want to find out from you right now because if it comes back later on.

Bainbridge: Well prints, I ain't got no prints. I didn't want to be involved. I wasn't even, intentionally, I didn't even know what was going on so I never touched nothing.

Killeen: You never touched nothing. Are you sure of that?

Bainbridge: I'm sure.

Killeen: Are you positive you never touching anything?

Bainbridge: I'm positive cause if you find any prints, it's pretty accidental cause I didn't do nothing.

Killeen: Okay.

Bainbridge: Cause I didn't even know what was going on.

Killeen: You say. What is the closest you ever got to her?...to Dixie that day?

Bainbridge: A good 2 - 3 feet. I didn't even come near her.

Killeen: Did you ever touch her?

Bainbridge: Not that day, no.

Killeen: When he was stabbing her and shooting her, what was the closest you ever came to her?

Bainbridge: I was about 4 - 5 feet away from her.

Killeen: Four or five?

Bainbridge: I wasn't even close to her cause the thought that was going through my mind wasn't even good cause I liked the lady.

Killeen: How would you explain the blood on your clothing?

Bainbridge: On my clothing?

Killeen: Yeah.

Bainbridge: I don't think I got any.

Killeen: What if we said that there was blood on your clothing and it was hers.

Bainbridge: I would ask you where cause I don't, I didn't even touch her. I didn't have no blood.

Killeen: So if we did find out, this is what I am asking, if we did find blood on your clothing, there would be no way you could figure out how it got there?

Bainbridge: No.

Killeen: Was that your pocket knife?

Bainbridge: No, I don't have no knives.

Killeen: I know you don't have a knife now, but what I'm saying, this is important, I know that you want to tell the truth...

Bainbridge: I am telling the truth.

Killeen: ...Okay, but I want to know the full truth. I don't want to leave anything out. I mean even if change something a little bit or even if you tint it a little bit; now, was that your pocket knife, that's important.

Bainbridge: No; I know it's important. I feel that it should be important.

Killeen: Are you telling the truth about that?

Bainbridge: Yes.

Killeen: Cause somehow I got a feeling that it was your pocketknife I really do.

Bainbridge: I don't have a knife.

Killeen: I know you don't have a knife. It doesn't have to be here now.

Bainbridge: I didn't have one. I didn't have a pocketknife and I didn't use it. I couldn't do that to her. I couldn't. No, I liked that lady. I liked her very much. I did.

Killeen: Did you go over there afterwards, a day or two afterwards and contribute to...

Bainbridge: Yes I did, because I had concern about all of this.

Killeen: Tell me about that Randy.

Bainbridge: I put in two fifty cent pieces to the guy that was there because I had a lot of concern into it because she was a very nice lady and I totally regret what happened because

I was, I was there, and there was nothing I could do.

Killeen: Why didn't you come to the police?

Bainbridge: I was afraid and I didn't trust the police in Idaho.

Killeen: Why were you afraid?

Bainbridge: Well I don't know why I was afraid; I was just scared to death because he might do something. Cause I didn't know what he was going to do.

Killeen: Were you scared to death about getting caught?

Bainbridge: I was scared to death about him.

Killeen: Were you scared to death about getting caught?

Bainbridge: No.

Killeen: He never threatened you. You told me that yesterday.

Bainbridge: Yeah, what do you get out of a guy that shoots a lady you know?

Killeen: What I'm saying is he never threatened you. (164)

Bainbridge: I don't even, no, he didn't threaten me.

Killeen: He had plenty of opportunity.

Bainbridge: I was in fatal shock. I don't know, I didn't even...

Killeen: Okay. We've got the gun, the Derringer and the bullets right where you said they would be. You said he threw the knife into the water. What about the empty, he unloaded the gun and you were there when he unloaded the gun. What did he do with those empty cases?

Bainbridge: He just threw them away.

Killeen: Where?

Bainbridge: When he was driving down the road. I don't even know the area. I would have to go there.

Killeen: Was it by the bridge?

Bainbridge: No, I don't think so.

Killeen: Where abouts?

Bainbridge : It was, if I knew the area I could tell you right off but I don't know the area.

_____ Let me draw you a picture, okay.

Bainbridge: It was no wheres close to where the incident happened.

_____ Okay, if this is the gas station, this is Chinden Blvd., you guys went the other way?

Bainbridge: No we went this way, you were right.

_____ Okay. And you go out here to Glenwood, and here is 47th Street where you went down to the warehouses, right?

Bainbridge: Uh huh (yes)

_____ And then you went back out and you went towards Glenwood, and here is Glenwood...

Bainbridge: We went around, we went back and around to go to get to that bridge.

_____ Okay, why don't you show me what you did. Here is the gas station.

Bainbridge: Went down here and then we went across here.

Killeen: Okay, where is Glenwood? Here is Glenwood and that big supermarket.

Bainbridge: Yeah. From this place we came back out and went down and across here.

_____ Down Adams Street?

Bainbridge: I think that's what it was. And through where the police drives their cars and stuff. And then we went out and got on this road here, about here.

_____ You went through the fairgrounds is what you are telling me.

Bainbridge: Yeah.

_____ Okay.

Bainbridge: And then we went up from there, across the river and out someplace...

_____ Down State Street? Did you go to Barger-Mattson's to buy your starter? Barger-Mattson's on State Street? When you went this way, is this where you got your starter?

Bainbridge: I went over by where the church was, yeah, over in this direction, this area over here, yeah it was in this area.

Killeen: Where abouts did you throw the bullets out of the car? The casings:

Bainbridge: I didn't throw the bullets out, he did, he just throw them out when we went over and got the starter and he went and drove around for a while out here, way out here, and then he turned around and came back in and on the way back in he threw the knife away over the bridge.

Killeen: Did he throw the casings out first or the knife out first?

Bainbridge: The casings out first.

Killeen: And whereabouts did he throw them out? Was it over in this area here?

Bainbridge: Yes.

Killeen: Somewhere around this area?

Bainbridge: Yes, and he threw the keys that he had, he threw them out there individually.

Killeen: Keys that he had?

Bainbridge: Along that road out there, that was out here, out in the boonies someplace, over a hill from the city. You couldn't see town.

Killeen: Oh, you couldn't see town?

Bainbridge: It was an old road.

Killeen: He threw them out individually...

Bainbridge: And (indiscernible) the knife you were speaking of it wasn't quite, it was about here when it was thrown out, almost in the middle.

Killeen: Almost in the middle? You know it hit water?

Bainbridge: Yeah, cause I seen it go over when he threw it.

Killeen: Okay, but was there any shubberage or trees in that area?

Bainbridge: Uh huh (no)

Killeen: Okay. How long has he had that gun?

Bainbridge: I don't know. I've only met him a couple of times.

Killeen: Tell me, okay yeah, you have only met him a couple of times, but apparently you knew him so why don't you tell me more about, Randy, tell me more about this thing we talked to you about the robbery...this is a week a week and a half before the thing...tell me in detail about what he said to you.

Bainbridge: Well, he more or less talked about when we were driving around.

Killeen: Nighttime? daytime?

Bainbridge: No, it was daytime. He always says it's easy; he says it's no problem, I says well...

Killeen: What's easy?

Bainbridge: He says it would be easy to make the robbery.

Bainbridge: I says I'm still on parole. I want nothing to do with it. I says if you want to use my little brother as a guinne pig, you go ahead, but I want nothing to do with it.

And he says well I've already told you about it and everything. And I says I can't help that.

Killeen: Tell me what he told you.

Bainbridge: He told me how he was going to do it; he was going to go in when there was another lady. He says another lady is supposed to stop in and pick up the money.

Killeen: Where was he going to go; to the same place?

Bainbridge: He didn't say the place until after; I didn't even know where.

Killeen: Just tell me what happened a week and a half or so ago; what was he telling you; he was mentioning names I know.

Bainbridge: He says we will be going up to a place, he didn't say names, he says we will be going up to a place, he says, he says one of us will have to go out in this other car when this lady drives up to get the money and he says we're going to have to put them in the back room and we're going to have to go get the money and go out, one of us will have to go out, run out to the car and get the bag of money that she had out in the car, the lady that was going to pick up this money and uh,

Killeen: Did he mention that lady by name?

Bainbridge: Uh huh (no)

Killeen: Are you sure of that?

Bainbridge: Uh huh, cause he said he wasn't sure I wanted to do it, and I said...

Killeen: Did he say gas station?

Bainbridge: No.

Killeen: He just said a place?

Bainbridge: Yeah, [redacted]uilding where nobody cou[redacted]see you from there. It was all open but nobody could see; there was windows all away around it.

Killeen: Is that what he said? There was windows all away around but nobody could see you back in the building?

Bainbridge: No. No, not after you got, you went in.

Killeen: Not after you went in?

Bainbridge: Yeah, and I says thats, thats totally up to you because I have nothing to do with it.

Killeen: What did he say he was going to do to these women?

Bainbridge: Uh - he said he was going to knock them out in the corner. And I says it has nothing to do with me.

Killeen: Randy, this is important because you just got through telling me that he told you the whole plan and that he was going to _____ it with you.

Bainbridge: Cause I didn't want to get involved.

Killeen: Okay, but the point I am getting at is that he told you the whole plan; now what specifically did you say he was going to do to these guys?

Bainbridge: He said he was going to go to this place and he said I'm going to park behind the car that comes in...

Killeen: He's going to park behind the car that comes in?

Bainbridge: Yeah, because there is a lady that is going to come in and pick up some more money and he says when it comes it we're going to stop and park where she can't get out at the moment. And he says we're going to go in and she's, I'm going to knock them out in the back corner ...

Killeen: Knock them out with what?

Bainbridge: With a pistol, he didn't say with what, he say I'm going

to knock them out and give you the knife to cut their throat and I spoke up and said no, I don't want to have nothing to do with it. And he says I've already told you.

Killeen: And he said I've already told you? Did he say he was going to kill them then?

Bainbridge: No.

Killeen: Are you sure?

Bainbridge: I'm just about positive of this cause...

Killeen: You got to be positive. You can't be just about. Now did he mention to you that I kindof think that's what happened. Is that what scared you so much?

Bainbridge: I think it was cause he did say cut her throat.

Killeen: He did say cut her throat.

Bainbridge: Stuff like that.

Killeen: So he...

Bainbridge: That's why I told him to begin with that I didn't want to be involved cause he was going to do that; killing and stuff.

Killeen: Did you ask him why he wanted to kill somebody? I'm sure you must have asked him.

Bainbridge: He said he was in debt.

Killeen: He said he was in debt?

Bainbridge: Yeah, for a few thousand dollars and he needed some money.

Killeen: He needed some money.

Bainbridge: And I said, at that time I said I didn't want to be involved. I said I don't even know who you are.

Killeen: Did he mention any names?

Bainbridge: No.

Killeen: Did he ever talk to you about Dixie?

Bainbridge: Uh huh (no)

Killeen: Did he tell you that he knew Dixie?

Bainbridge: No, yeah cause he worked there before.

Killeen: What did he say about her?

Bainbridge: Nothing really.

Killeen: What did he say afterwards about her? I know you guys talked. You don't drive around the whole time...

Bainbridge: Well, he said something about...

Killeen: What exactly did he say afterwards?

Bainbridge: He didn't say much, like I say before, he didn't say much afterwards.

Killeen: He must have talked about the killing.

Bainbridge: No he didn't. He didn't say nothing about the killing.

Killeen: Nothing at all? A big joke?

Bainbridge: No, I was scared because he didn't say nothing. I was very frightened because I didn't know what to do. I didn't know the mood or anything. He might hit me or something, or shoot me, cause I'm not a violent person.

Killeen: You said you went over to Denny's?

Bainbridge: Yeah. I wanted to have some coffee cause I wanted to find a way to get away from the guy.

Killeen: What was _____ this whole time?

Bainbridge: Uh, I think that was right afterwards too.

Killeen: Before you did all the rest of the stuff? Get it down tight because we have talked about...

Bainbridge: Rest of the stuff?

Killeen: Before you went over there and dumped the gun and dumped the knife and everything like that you went to Denny's first?

Bainbridge: Yeah.

Killeen: Okay, why don't you tell me about that?

Bainbridge: We went, just stopped at Denny's and I wanted to find a way of getting out of it cause I wanted to leave.

Killeen: Okay, wait a minute. Now when you left then, you didn't turn this way, you went to Denny's?

Bainbridge: No we went out and got rid of the shells first. The shells and the knife.

Killeen: That's what I just asked you.

Bainbridge: The shells, not the gun, he has the gun.

Killeen: So you got rid of the shells and the knife?

Bainbridge: Yeah.

Killeen: Then you came back to Denny's.

Bainbridge: Yeah.

Killeen: Did you go to the automobile store yet?

Bainbridge: No, not yet.

Killeen: Then you went to Denny's. How long were you at Denny's?

Bainbridge: Enough to have a half cup of coffee or so. Not very long.

Killeen: Did he wash his hands?

Bainbridge: Yes, he did.

Killeen: Did you wash yours?

Bainbridge: No.

Killeen: Are you sure?

Bainbridge: I didn't do nothing.

Killeen: I didn't ask if you did anything. I just asked if you washed your hands.

Bainbridge: No I didn't cause I just didn't. I just wanted a way of getting a hold of one of the waitresses cause they all knew me at Denny's.

Killeen: Where w[redacted] you at when he went in [redacted] restroom to wash his hands?

Bainbridge: I was sitting out there at the table trying to get a hold of one of the waitresses.

Killeen: Why didn't you get up and walk away?

Bainbridge: Because he wasn't in there that long. I did get up but I didn't leave because he was coming out of the bathroom, he wasn't in there very long. Like I said, I was in the process of leaving; I didn't want to be involved.

Killeen: When did you finally leave?

Bainbridge: He let me out - of the van.

Killeen: Then what did he do?

Bainbridge: Then we went down and we went and seen, and I put the starter back in the van and til it worked and it worked right off so he said are you satisfied you got what you need now and I says yeah. I said I got my starter going.

Killeen: What time was that?

Bainbridge: About nine.

Killeen: What did you do then?

Bainbridge: I got my van; I went home.

Killeen: You were all by yourself?

Bainbridge: Yeah.

Killeen: He wasn't there?

Bainbridge: I went down to the house; no he wasn't. He just took off. I followed him. I was watching where he went, we left. We went down that street where the employment office is, coming back from that direction, you turn to go to Garden City and city center. Well he went straight and stopped at the light and I turned and went home.

Killeen: Did you [redacted] to the police then? [redacted]

Bainbridge: I went down, to go see if I could get a hold of my parole officer. I feel, I felt at the time the police weren't good enough. You know, I wanted to be...

Killeen: Did you ever get a hold of your parole officer?

Bainbridge: Well, partially, yes I did. I went down there.

Killeen: And talked to him?

Bainbridge: Not very much.

Killeen: Tell him what happened?

Bainbridge: No, I thought he knew and I was going to have him speak up about it first.

Killeen: What do you mean you thought he knew?

Bainbridge: I thought he had known about it by then.

Killeen: Did you tell him you were there and were involved.

Bainbridge: No I told him about the place. I said something about, I think something relevant to what happened and I wanted to talk to him about getting a job and stuff and so I wouldn't need to worry about nothing like that.

Killeen: You didn't mention to him what happened?

Bainbridge: No, I wasn't in the position to do that.

Killeen: Why not?

Bainbridge: We was out in the parking lot.

Killeen: Did you talk to him again about it later?

Bainbridge: No, we went on in into his office and I put in my report and stuff .

Killeen: Did you ever talk to any police about it later?

Bainbridge: No, I really have no value for the city police officers.

Killeen: Okay. Going back again in the morning time, why did you go to the service station to begin with?

Bainbridge: He went over and said he needed to get a pack of cigarettes.

Killeen: That's what he told you?

Bainbridge: Yes, and he bought a pack of cigarettes when we were there.

Killeen: And what was your intention...when he picked you up that morning, you left your house, what was your intention as soon as you got the pack of cigarettes, what were you going to do then?

Bainbridge: I was going to run down and see if I could find a place to get a starter.

Killeen: Where were you going to go?

Bainbridge: To see what the prices were on it.

Killeen: You were

Bainbridge: Yes, down below, down by Friendly Fred's.

Killeen: I see. How many times do you purchase things from automobile stores, that kind of thing?

Bainbridge: Oh, just a few things.

Killeen: I mean have you been to automobile stores and purchased things before?

Bainbridge: Not that many, not here.

Killeen: Not that many? Have you ever gone to stores before, regular stores and things?

Bainbridge: No, well I stopped by to see about a gas spout and stuff.

Killeen: I see.

Bainbridge: But that's...

Killeen: What time would you say you left your house?

Bainbridge: Uh, it was about 6:15 maybe; 6:30 when we left the first time.

Killeen: When you left the first time?

Bainbridge: Cause [redacted] just got me up out of bed [redacted]nd said let's go and I said well I got to get a starter.

Killeen: How long, how long did you figure it would take to get cigarettes?

Bainbridge: Oh I don't know, just a few minutes.

Killeen: Just a few minutes.

So that would put it at 6:30?

Bainbridge: About that time, yeah.

Killeen: About that time. And then you were going to go buy a starter.

Bainbridge: I was going to see about one, I wasn't going to buy one cause I didn't have no money at the time, just a few dollars to where I couldn't...

Killeen: You didn't have any money then?

Bainbridge: Oh I had some money, but not enough to buy one that's why I wanted to see what I would get on the trade in so we went back after I checked on it at _____ and they didn't have any so then went back down to my house and got the starter, and he said well I know a place and I says oh you do, and if it's cheap okay let's see what's going on, I got to see the price so I can turn my old one in for. And he went down there and the guy says about $37 I think it was and he says here you are, and he put up $30 and I think I put out...

Killeen: What else did you want to do that morning?

Bainbridge: I wanted to go up and see the lady that my van, my van happened to be sitting in front of. Mary's house.

Killeen: She's a friend of yours?

Bainbridge: Yes, she's kind of a relation that...

Killeen: But were you planning on doing that before or after you fixed your vehicle?

Bainbridge: Well I was thinking of going and doing it before but she wasn't there at the time.

Killeen: Wait a sec, you lost me. Did you mean...

Bainbridge: It was, before I put the starter in I was going to go in and say hi to her and the little kid.

Killeen: Well, what I am saying is, were you planning on visiting with her before you went over to check on the parts or after?

Bainbridge: After.

Killeen: After ?

Bainbridge: Uh huh (yes)

Killeen: What time does she normally get up?

Bainbridge: I don't know. She usually, I usually wake her up.

Killeen: Well, what time?

Bainbridge: Seven, seven thirty, after I take Ruby to work.

Killeen: When do you take Ruby to work?

Bainbridge: Yeah, after I take Ruby to work, she has to be there before seven.

Killeen: Monday, Ruby didn't go to work.

Bainbridge: I know it. So I didn't, so it was after that though, it was about the same time, usually about 7, 7:30, when I usually went up there anyway.

Killeen: When you usually went up there, but on that particular Monday...

Bainbridge: It was her day off.

Killeen: And you were going to buy the parts and then to visit?

Bainbridge: Yeah, a[redacted]stop by and just use it [redacted]an excuse while I fix the van. Fixing the van was the excuse I was going to use with my old lady, Ruby.

Killeen: Why did Lacey start stabbing the girl? There had to be a reason why.

Bainbridge: At the time, he said something about...

Killeen: Did Lacey tell you before he went in there that he was or after you got in there that he was going to kill her?

Bainbridge: Uh huh (no). I did't even know it was going to happen. I was going to get a pack of cigarettes.

Killeen: The girl knew you and she knew Lacey.

Bainbridge: I know she knows me. Cause I go in there quite often.

Killeen: And she knew Lacey?

Bainbridge: Yeah, cause he used to work there.

Killeen: Why did he start stabbing her?

Bainbridge: I don't know. He said something about when he hit her he didn't hit her hard enough or something like that; when he knocked her out or something like that, I can't really recall it because I didn't want to even hear it or anything that was going on.

Killeen: He wanted to kill her didn't he?

Bainbridge: I guess, from the review of what I had noticed, cause I just noticed a few things that happened because I didn't want to see any.

Killeen: What do you mean review of what you noticed? What he told you before, a week before, about cutting her throat?

Bainbridge: That's what I had in mind and I didn't really believe him until I glanced over there.

Killeen: Why don't you tell me about how you knew he was going to kill her.

Bainbridge: Wait til he took out the knife and [redacted] wanted me to do it and I didn't want, I said no.

Killeen: How did he take the knife out?

Bainbridge: He just took it out of his pocket and put it, set it on the table and he says...

Killeen: Which pocket did he take it out of?

Bainbridge: That I don't even know. I didn't see which pocket.

Killeen: Was it fixed blade?

Bainbridge: Fixed blade?

Killeen: In other words, it was a knife with a blade sticking out of it.

Bainbridge: No, it wasn't open yet.

Killeen: It wasn't open?

Bainbridge: It was closed when he put it on the table.

Killeen: It was closed when he put it on the table?

Bainbridge: Yeah.

Killeen: Who opened it?

Bainbridge: He did.

Killeen: Did you see him?

Bainbridge: Yeah, after he sent her back into the other room and clobbered her.

Killeen: He went back into the other room and hit her?

Bainbridge: Yeah.

Killeen: And then he came back out for the knife?

Bainbridge: And then wanted me to do it. And I said no.

Killeen: After he hit her he came back out and got the knife?

Bainbridge: Yeah.

Killeen: Is that when he wanted you to do it?

Bainbridge: Yeah.

Killeen: What did he say to you?

Bainbridge: Said he wanted me to do it before that.

Killeen: Well tell me about it then. Tell me that. How did he want to do it before that?

Bainbridge: He had the gun on the table, just as he had on it, he hadn't quite let go of it yet and he said go back in the other room, and he was going back in the other room and he said, put the knife down, and he says he wanted me to cut her throat.

Killeen: Right in front of her he said that?

Bainbridge: Uh. No he was just hitting her at the time he said that.

Killeen: He was just hitting her? How many times did he hit her?

Bainbridge: Just once that I know of.

Killeen: And you, of course you were just standing where you could see that.

Bainbridge: Yeah, I seen her go to the floor and I just, that's when I turned around and didn't look because I didn't want to have nothing to do with it, cause I liked the lady. I liked the lady a lot.

Killeen: Well then he came back again and asked you again huh?

Bainbridge: He asked me to cut her throat and I said no man. I says I don't want to be involved with this.

END OF TAPE 1, SIDE 1

START OF TAPE 1, SIDE 2

Killeen: ...now Lacey, we're going to go look for that knife and chances are that we are going to find that knife. If your prints are on that knife; how do you explain that:

Bainbridge: There won't be no prints on that knife.

Killeen: Are you positive?

Bainbridge: I'm positive.

Killeen: No way in the world that they are possibly on that knife?

Bainbridge: Uh huh (no) cause I didn't even touch it.

Killeen: What about the blade? The blade broke off you know, we have that and right now it's at the lab. You told me it broke off.

Bainbridge: It broke off, I think it broke off when he was stabbing her.

Killeen: Right, you already told me that. We've got that. Now if your prints are on that blade how are you going to testify to that?

Bainbridge: There is no way you can find it because I didn't touch it. I swear to God I didn't. I swear I didn't touch it. At any time. I didn't want to be involved in none of it. I didn't touch none of it.

Killeen: You saw the blade break didn't you?

Bainbridge: No I didn't see it break.

Killeen: How do you know it broke.

Bainbridge: Cause when he come back out after he, he knifed her and shot her up and I was getting ready to split at the time but he said well, let's go you know, and I was already starting to go out the door because I didn't want to be involved with it and he says wait a minute and he picked up the money out of the safe and he says let's go and we left and he showed, when he was doing that on the way to the safe he showed me he broke the knife, that's why he shot her.

Killeen: Is that what he said?

Bainbridge: Yeah. Cause he had broke the knife.

Killeen: What did he say?

Bainbridge: Fuckin knife broke or something like that.

Killeen: What did he say about shooting her?

Bainbridge: Didn't say nothing about it.

Killeen: You had to jump out of the way when he started shooting didn't you?

Bainbridge: I wasn't in the way. I wasn't no wheres close to it.

Killeen: No where close?

Bainbridge: I was outside, I wasn't inside that little office; that little room.

Killeen: You were standing by the door at one time when he was knifing her.

Bainbridge: Yes, that's why I left man.

Killeen: Where did you leave?

Bainbridge: I went further out so I couldn't see nothing cause I didn't want to see cause I liked the lady.

Killeen: I see. How much time did he spend back there alone with her?

Bainbridge: Just a few minutes and then he started banging.

Killeen: A couple of minutes?

Bainbridge: Not even that long.

Killeen: How long?

Bainbridge: Just a few seconds.

Killeen: Few seconds?

Bainbridge: Yeah.

Killeen: A thousand one, a thousand two,...

Bainbridge: Maybe about fifteen seconds then I started hearing

banging racking of a gun and I l ed, and just as I looked, she fell to the ground and maybe I did, do have blood on me because when I looked, it was about the last shot, and something came off of her head, over here on this side, it come my direction and I got more scared and I moved on out of the way because I didn't want to get no where near the bullets and stuff.

Killeen: Those pants you were wearing when you were taken into custody yesterday, those were the ones you were wearing at the time weren't they?

Bainbridge: No.

Killeen: Are you positive?

Bainbridge: They were blue jeans. They were blue Levis. There were button up; they buttoned up the front and they was thin down the leg.

Killeen: What did you do with those Levis?

Bainbridge: I changed my clothes when, the next day, like I usually do.

Killeen: Did you have blood on those Levis?

Bainbridge: Not that I know of, no. I had grease because I was working on the van that day; that's why I changed them. I wouldn't have changed them if they weren't greasy.

I just dont' want to...

Killeen: What I'm trying to tell you Randy, is I think you are coming up part way but I still, just still don't think you are telling me the full truth.

Bainbridge: I wish I could get you to believe it.

Killeen: Well you can, you can Randy. You can...

Bainbridge: I'm telling you as close to the truth as ...

Killeen: Well, l[redacted]s take a lie detector tes[redacted] okay?

Bainbridge: I'm ready. I am.

Killeen: Okay, we can get one squared away. We'll do it.

Bainbridge: I'd appreciate it.

Killeen: You tell your attorney that you want to prove to us that you are telling the truth; you tell him you want to take it.

Bainbridge: I am; I had nothing to do with it. I don't want to be involved because...

Killeen: Hey, we want to shoot strait with you too.

Bainbridge: I'm not a killer, man. I'm not even, I don't even rob people. Maybe I have when I was younger over in Oregon. I'm not, man.

Killeen: Did Lacey discuss this plan with you further too?

Bainbridge: Not that I know of.

Killeen: Do you think he did?

Bainbridge: He probably did. He come looking for my little brother.

Killeen: Where is your little brother at?

Bainbridge: He's over in Weiser.

Killeen: Where at in Weiser?

Bainbridge: With my dad.

Killeen: What's your dad's address?

Bainbridge: I don't know. It's over on East Commercial.

Killeen: East Commercial in Weiser? You got a phone number?

Bainbridge: It's in my wallet.

Killeen: You got your wallet here?

Bainbridge: No.

Killeen: Is your dad listed? In the phone book?

Bainbridge: Delmer Gene Bainbridge.

Killeen: Delmer Gene Bainbridge? Is it Delmer Gene Bainbridge?

Bainbridge: Yes.

Killeen: So we can get a hold of him; and your brother is living there with him?

Bainbridge: You should, yes.

Killeen: And your brother's first name again is?

Bainbridge: Alan.

Killeen: Alan.

Bainbridge: I have two brothers.

Killeen: This is the one, Alan was the one he would have talked to?

Bainbridge: Yes.

Killeen: How old is Alan?

Bainbridge: Alan is 21 I think; I'm pretty sure. I just hope to get this all cleared up because I don't want nothing on my shoulders.

Killeen: When Lacey shot that gun, how did he shoot it? Why don't you describe to me how he shot it.

Bainbridge: I don't know, he wasn't in my direction.

Killeen: You must have seen, you must have seen something, at least how he was holding it or part of it. You were in close proximity.

Bainbridge: I didn't. She was in the way because she was inbetween us.

Killeen: She was in between you; so why don't you explain to me why don't you...

Bainbridge: I didn't even see his face or nothing. I wanted to see if I could see his features because the gun was going off.

Killeen: I'm going to draw a little diagram; I want you to show me (drawing the diagram) here's the counter, here's the front door, of course these are all windows and here is her chair right there, okay? And here is the ____ right

there i[redacted] little metal chair, whe[redacted] was that at when you were there. A little metal, folding chair.

Bainbridge: I don't remember seeing it.

Killeen: Why don't you point to me where you were standing.

Bainbridge: At what time?

Killeen: Okay. Let's take, let's take the, where were you standing when he approached her and he took out the gun and put it on the counter.

Bainbridge: I was standing over here right between the desk...

Killeen: I'm going to put an "X" where you were standing. You were standing right here?

Bainbridge: No.

Killeen: Where. Why don't you make the "X".

Okay, that's where you were standing. Where was he standing?

Bainbridge: _____ was here. He was over here.

Killeen: Okay, make a "Y". He was there?

Bainbridge: Yeah.

Killeen: Okay, that's when you first came in. Okay. And he took her in the back room?

Bainbridge: Yeah, and I had to go; I went over here.

Killeen: Now you were standing here and you saw her being knifed cause you already told me that already.

Bainbridge: Yeah cause that's when he...

Killeen: Where did you stand when he was knifing her?

Bainbridge: I was standing over here.

Killeen: Make another "X". Okay put a "1" by that, a little "1". Now you were standing there. Now you show me where she was and where he was.

Bainbridge: She was...

Killeen: Wait, pu[redacted]'V" for her. Put "V". O[redacted] now I want you to put a "Y2" for him where he was standing. Okay, so, now what I want you to do is I want you to put an "X2" where you were standing when the shots were fired.

(indiscernible)

Wait, when he first started shooting, now where was she when he first started shooting?

Bainbridge: She was right here. She was trying to get away.

Killeen: That's a "V", put a "V", a "V2" there. Where was he, put a "Y3"...

Bainbridge: He was over here. I couldn't even see him, he was back behind her.

Killeen: Okay, figure out where you think he was. Where do you think he was? "Y3", Okay, this is the shooting, huh?

Bainbridge: Yeah. She was right in front of me where I couldn't see so I moved out over here. There was some oil things different kinds of oil right here on the wall and I went over to it because I didn't want to be involved because after I had turned around from right here and seen him shoot, he was shooting in my direction so I went over here to look at that oil container thing to get my mind off of what was going on because I didn't know what was going on. The guy was going to kill this lady for some reason, some how, some way and he was shooting the gun in my direction and I didn't even want to be near it, and I was gonna leave.

Killeen: So here she was between the two of you when he started shooting the gun.

Bainbridge: Yeah, and here I was and I started to leave...

Killeen: Isn't that what I asked you earlier though, when he started shooting the gun, but you got out of the way?

Bainbridge: Yeah.

Killeen: Were you concerned about getting shot yourself?

Bainbridge: I didn't even want to see her hurt. That's the only reason...

Killeen: In other words, you didn't care about yourself getting shot. You just didn't want to see her get hurt.

Bainbridge: No, not at that time. At that time I did not. Because I liked that lady.

Killeen: Was she standing up then?

Bainbridge: Yes, she was trying to make her way out.

Killeen: You mean, she was, after she had been stabbed, she was trying to run?

Bainbridge: Yeah, uh huh. She had blood all over her and I just, I didn't...

Killeen: She was running. Was she running well?

Bainbridge: Not really running, she was moving.

Killeen: But she was trying to get out?

Bainbridge: Yeah.

Killeen: So you were looking right at her face?

Bainbridge: Uh huh (yes)

Killeen: You were looking right at her? Was she looking at you?

Bainbridge: No, I don't think she, her eyes were looking at me.

Killeen: Was she kindof, was she yelling for help or screaming save me or anything like that? What was she saying?

Bainbridge: She was just whining a little, hollering a little. I don't know...

Killeen: She must have been saying something.

Bainbridge: Or no Lacey, or something like that?

Killeen: I don't know, I'm asking you.

Bainbridge: Well, no Lacey, or something, don't do that, I won't tell, or something; she was hollering, I didn't really verbalize her words she was saying.

Killeen: Then he shot her?

Bainbridge: And then I seen some stuff come off her head and I just went over here out of the way cause I wanted to leave also and he, right after that I swear she was laying half and half.

Killeen: How many times did he shoot her when he was standing up?

Bainbridge: He unloaded the gun in her, man.

Killeen: But when she was standing up though? You said you saw something come off her head after he shot. Was that the first time?

Bainbridge: No.

Killeen: She was standing up though?

Bainbridge: Yeah.

Killeen: Did she ever fall down?

Bainbridge: I think she fell down a couple of times in here when he was knifing her.

Killeen: Did she ever fall down after he shot her?

Bainbridge: The last time.

Killeen: And she was standing up all the time that she was getting shot?

Bainbridge: Yeah.

Killeen: And fell down, she only fell down the last shot?

Bainbridge: Yeah.

Killeen: Are you sure of that?

Bainbridge: Yeah, I'm sure. From what I could see. Like I say, I didn't even look at most of it because I didn't even want to be involved that's why I went over there towards the door.

Killeen: Could she have been standing over here when he shot her?

Bainbridge: First few shots maybe, yeah. On her way out. All I seen was that one shot in the head.

illeen: Do you have any questions?

feiffer: You said that Dixie had some blood on her when she was coming in.

ainbridge: Yeah.

feiffer: How much blood did she have on her?

ainbridge: A lot around her top. Around her neck and stuff; that's what I thought. When he started, just before he started shooting her, cause she was still up.

Pfeiffer: Tell me where it was on her body.

Bainbridge: See was facing more or less this direction, some here and mostly on this side.

Killeen: Mostly on left side?

Bainbridge: Yeah, I'm sure it was.

Pfeiffer: When she was trying to get out, is that what you are saying?

Bainbridge: She was coming out the door, yeah.

Pfeiffer: Did you say that you saw her expression?

Bainbridge: Yeah, partially on the last time he shot her. When I moved; he was shooting in my direction and I happened to look up cause I heard, you know, seen her, noticed she was still standing up and I looked and some stuff come off her head and I just went over here to the door and I was getting ready to leave and he says wait a minute and he walked right after that, she was laying down and didn't see where she was laying down cause I was more or less leaving at that time, and he came out and said wait a minute and I was by the door and he come over to the safe and took out the money and said lets go and we left. But that was after he, he also, he shot her and I was getting ready to leave and there was some people coming in to pay for some gas and he went ahead, and he took care of them, and I said I'm going to leave, and he went ahead and took care of the people and took the money from them, and then he cleaned out the

till and [redacted]ked over and I, at the time I [redacted]k I still, I'm pretty sure I had my hand on the door to go, I was going to leave, and he picked up the money and were out the door. And I was going to go around, his car was parked over here, and her car was parked here, and I was going to just keep on going and go home cause I live right back here, and I got to almost the middle of that garage that's here and he said let's go, let's go and get that stuff you wanted, the starter and I went and got in the car and we went and had coffee I think, I'm pretty sure first. Cool down, he says, and I said well I just want to fix my van. Well then, we came back and went down this road to my house and got the starter I had, the old one, in the front and I picked it up and said hi to Ruby cause she, I had woke her up when I came in the door and then we left and went and got the starter and I put it in and then...

Pfeiffer: Randy, when you walked over to the cylinder oil things that you are talking about, did you touch those: You were looking at them did you touch them at all?

Bainbridge: Uh huh (no)

Pfeiffer: Did you touch anything over there?

Bainbridge: Not really, I didn't.

Pfeiffer: You were Dixie's friend weren't you?

Bainbridge: Yes I was. I was hopeful anyway. I really liked her.

Pfeiffer: Did she know your name?

Bainbridge: Yes.

Pfeiffer: Did she call your name out for help?

Bainbridge: No. I probably would have helped her, I really probably would have.

Pfeiffer: Do you think if she had called your name out for help you would have helped her?

Bainbridge: Yes.

Pfeiffer: Whatw ould you have done?

Bainbridge: I would've beat the guy up. Cause I didn't even know who he was.

Pfeiffer: She was hurting wasn't she?

Bainbridge: Yes.

Pfeiffer: A lot of blood?

Bainbridge:

Pfeiffer: Had you guys been drinking at all?

Bainbridge: No.

Pfeiffer: Had you been drinking?

Bainbridge: I don't drink.

Pfeiffer: You don't drink at all?

Bainbridge: No.

Pfeiffer: Any drugs?

Bainbridge: I have a few beers with a friend of mine, he just got out of the service. I had three beers at the house.

Pfeiffer: Had you had anything to drink or any medication, any pills at all?

Bainbridge: No, I had just gotten up.

Pfeiffer: Okay.

Bainbridge: He woke me up.

Pfeiffer: How about Lacey, did he look as though he had been drinking or did he smell as though he had been drinking?

Bainbridge: He looked wide awake.

Pfeiffer: Do you think he had been drinking?

Bainbridge: I don't know; I never had that in mind.

Pfeiffer: Did you smell any alcohol?

Bainbridge: No.

Pfeiffer: Did he say he had been drinking?

Bainbridge: Uh huh (no)

Pfeiffer: What exactly when Dixie was screaming, what did she say?

Bainbridge: Something about no Lacey, I won't tell and that's when it really

hurt me is because when she said that I just wanted to leave, I just didn't, I was in a state of shock is all I can think of because I didn't want to have nothing to do with it. It just...

Pfeiffer: What was Lacey's expresssion when he was stabbing this girl? When you saw his face.

Bainbridge: No, I didn't see his face.

Pfeiffer: What were you looking at?

Bainbridge: I was more or less, I didn't want to be involved.

Pfeiffer: Well, I think (indiscernible) before you decided you didn't want to be involved, you saw some of it. You saw his stabbing her.

Bainbridge: Naw, I think that's when I saw that lady out there that drove in and turned around and drove back out. I think that was the time I seen that lady in the pickup, an old blue pickup.

Pfeiffer: You didn't see Lacey's expression at all when he was stabbing her?

Bainbridge: No, uh huh.

Pfeiffer: When he hit her on the head?

Bainbridge: No. I had her back to me when he hit her.

Pfeiffer: Did you ever see Lacey's expression when he was doing anything, any kind of violence on this girl.

Bainbridge: No, uh huh.

Pfeiffer: You told me that when you bought that starter, you had a receipt for it, you had it at your house. Where is it?

Bainbridge: That light, there's two lights going out the front door. One's got a lens on it the other one don't. The one with the lens over by the clock, it was stuck in there. I wanted to turn the guy in man, then, so I could, so I put it where I knew where it was at cause if I needed to use it I would. I didn't want to get rid of it.

Pfeiffer: You also said that Lacey needed cigarettes, that's all you wanted.

Bainbridge: Yeah.

Pfeiffer: You got cigarettes too, didn't you.

Bainbridge: Uh huh (no)

Pfeiffer: Lacey said that you bought some, or took some Benson and Hedges cigarettes...

Bainbridge: No, I didn't take no cigarettes. I have no right to.

Pfeiffer: Did you buy them?

Bainbridge: No, I already had some. My only lady, why she had already gotten some for me.

Pfeiffer: Why would he tell us that you had cigarettes, you went there to get cigarettes?

Bainbridge: Don't ask me, cause I didn't go in there for cigarettes. I didn't even want to go there. I wanted to go and get my van fixed at that time. I kindof wondered why he was there so early at the time, when he come and got me.

Pfeiffer: What did you eat when you went to Denny's?

Bainbridge: Didn't eat nothing.

Pfeiffer: What about Lacey?

Bainbridge: No. We both had coffee, we sat over by the windows, front windows in a booth.

Pfeiffer: Toward the entrance or toward the back?

Bainbridge: It was closer to the entrance but it was a booth along the windows. As you come in here, there is a big booth in the corner and then around the booths here, we was in one, the second one I think.

Pfeiffer: From the front.

Bainbridge: From the front? No, the front is right here.

Pfeiffer: Close to the restrooms?

Bainbridge: No, you had to go around this way to the restrooms.

'feiffer: Okay, do you remember what your waitress looked like?

Bainbridge: No.

'feiffer: You don't remember huh?

Bainbridge: It might have been the lady that wears the sweater all the time.

'feiffer: Did you ever know that Lacey worked at that Phillips 66 station?

Bainbridge: Yeah, cause that was my regular gas station, my regular gas station stop.

'feiffer: So you knew that Lacey knew Dixie?

Bainbridge: Yes. Cause he worked there. The only thing I didn't get out of him he may have been upset with her because he lost his job.

Eilleen: Is that what he said?

Bainbridge: No. That's the only thing I can get out of it, why he done it cause he was very brutal to her. Like I said, I liked the lady so...

feiffer: You knew he was going to kill her, didn't you.

ainbridge: No, not right off I didn't. I didn't know what he was going to do.

feiffer: How could he not kill her if she knew who he was and who you were? What good would knocking her out do?

ainbridge: I don't know. I've never been in that position before.

feiffer: Think about it.

ainbridge: He would have to kill her.

feiffer: Sure he would.

ainbridge: I pray to God I could do that all over again.

illeen: Let me ask you this, Randy...

ainbridge: I would have never fixed the van.

illeen: Randy, did you write that on the desk in the interview room, "help me God"?

ainbridge: Well, need all the help I can get.

Killeen: You did [redacted]e it then?

Bainbridge: No, I didn't write it.

Killeen: Well, you scratch it in there? It said help me, it apparently was you because no one else did it.

Bainbridge: Well, I don't remember writing it.

Killeen: You don't want to talk about it at all?

Bainbridge: Uh huh(no), I don't even remember seeing it.

_____ It was last night when you were brought in.

Bainbridge: Yeah?

_____ It says God help me. Did you write that? On the desk? You know, like with a knife?

Bainbridge: No, I don't remember writing it.

Killeen: Do you have a job, or did you have a job?

Bainbridge: No, not really, I was more or less taking care of my mother's house.

Killeen: How much money were you making?

Bainbridge: I wasn't making no money.

Killeen: How were you living?

Bainbridge: Ruby. Ruby was doing the work.

Killeen: Any bills?

Bainbridge: Myself, no. Except for a ticket I had for no insurance.

Killeen: But you needed a car. Did you need money to get that car fixed?

Bainbridge: Yeah.

Killeen: You did.

Bainbridge: I had to get a starter.

Killeen: In other words, if Lacey hadn't given you the money to get that part, you could not have gotten the car going?

Bainbridge: No. I just, I was just going to see if I could fix it, that's why the starter was at home.

Killeen: But you couldn't huh? You needed a new starter.

D 42

illeen: Did your wife miss work because the car was b[redacted]e down?

ainbridge: No.

illeen: How come she stayed home on Monday?

ainbridge: She gets Sundays and Mondays off.

illeen: She get Sundays, I'm sorry.

ainbridge: She get Sundays and Mondays and maybe Tuesdays some days. I don't know what she is going through right now.

illeen: When you left that house, you knew that you were going to go over there and you wanted to rob that place didn't you?

ainbridge: No.

illeen: I mean didn't you really know once you got outside?

ainbridge: No.

illeen: Now think about it, just think about everything you have told us. Think about the time that you went over there; think about the time you were going to go get the parts; you knew that, you had to.

Bainbridge: It was pretty early.

Killeen: But see, that's just it; you had to.

Bainbridge: It had to be something.

Killeen: It did mean something to you. Deep in your subconscious, deep down inside. You knew what was going on; he already mentioned it to you before, you left so early, there is no place...

Bainbridge: I didn't know we was going to do that.

Killeen: Now think about this Randy.

Bainbridge: I'm trying to.

Killeen: Try real hard because, I'll help you, because you know the left the place a little after six in the morning; there is no place you can anything for a couple of hours, at least at hour...

Bainbridge: I just got up.

Killeen: Yeah and you were going over there, and you were going to the

gas st[redacted]on...

Bainbridge: For a pack of cigarettes.

Killeen: Right. But the point, you got a head on your shoulders, put it together. You knew you were...

Pfeiffer: This was the right time (indiscernible)

Bainbridge: Well it was the right time.

Killeen: It was the right time everything was right. You go in the morning, why don't you come on and tell us because that is the part I know you are holding back and why don't you get that out, get it off your chest.

Bainbridge: I'm trying to cause I don't remember knowing about it.

Killeen: Well you are trying, but why don't you go ahead and spit it out. You make, hey, you remember how relaxed you were yesterday when we first talked, after you started talking to us?

Bainbridge: Yea.

Killeen: Just thing how much more relaxed if you tell the whole truth because right now we know you're only telling part of it.

Bainbridge: I'm telling it as closely as I can.

Killeen: Yea but as close as you can, but it's not the complete truth. That's the difference.

Bainbridge: It's not the...

Killeen: You know that.

Bainbridge: What, what am I missin?

Killeen: Cuze when you came out...Well, what you're missin is when you came out you went over there. You guys, you knew, you knew in your own mind and your own heart that the robbery was going to go down then. The thing that you discussed before. That's the truth and that's the part that we want to get out. We're talking about, you know, God help you. That's what you're saying, "God help me" but yet

you're lying in front of God when you're not telling the truth.

Bainbridge: I can't lie in front of God.

Killeen: Well, that's what I'm trying to say. We don't want you to lie in front of God. We want you to tell the truth and right now is the time to tell it.

Pfeiffer: Randy, it's not going to change, it's already happened.

Bainbridge: Yea, I know it.

Killeen: So why don't you, you know, just say it. You see, see how easy it is to say. What a burden it's going to lift off your chest.

Bainbridge: I didn't see, I didn't see the, I didn't see that we was going to that that early.

Killeen: Well, I'm not...

Bainbridge: I don't know why it was that early.

Killeen: I'm not saying that you saw that what he was going to do to her.

Bainbridge: I was just getting up out of the morning, I didn't, I didn't realize what was goin on.

Killeen: It's one, it's one thing to kill a woman...

Bainbridge: I wanted to get my fix....

Killeen: Randy, it's one thing to kill a woman, it's another thing just to go do a robbery. I'm just saying that. I'm saying you went over there, you knew that the robbery was going down. I'm not talking about the killing.

Bainbridge: Not before I got there.

Killeen: Well, well, when you got there you knew it was going down.

Bainbridge: Yea, and I just wanted to leave.

Killeen: And you went in.

Bainbridge: Yea.

Killeen: When you went you knew it was going down. I know that. You knew that.

Bainbridge: Not when I went in. I didn't know what we was going to rob the lady.

Killeen: Why would you go over there?

Bainbridge: He wanted to get a pack of cigarettes and that was the cheapest place close.

Killeen: But then you were going to go buy auto parts and there's no place open for an hour and a half yet.

Bainbridge: I know but it was too early. I thought we was gonna stop at Denny's first, but I, I, at the time...

Killeen: Oh, come on, you said you had no other plans. You already told me that you had no other plans.

Bainbridge: No.

Killeen: All you were gonna do was go look for the parts at the store.

Bainbridge: Yea.

Killeen: And that was it, just stop off there and get a pack of cigarettes.

Bainbridge: Yea.

Killeen: You knew what you were stopping off there for. It had already been discussed.

Bainbridge: For a pack of cigarettes.

Killeen: No, you knew before that you'd talked about a robbery.

Bainbridge: I didn't know that we's gonna rob the lady, man.

Killeen: A week before.

Bainbridge: I didn't know...

Killeen: Come on.

Collins: Randy, you just said something. You said you got up in the morning and something about a fix?

Bainbridge: Yea, I wanted to fix the van.

Collins: Oh, OK.

Bainbridge: That was my whole intention. I didn't, I never realized it was that early because I'd just got up. I just wanted to go see about my, I just wanted to fix my rig.

Killeen: Randy, [illegible]ow it's hard to say. I know it's hard to say.

Bainbridge: I didn't...

Killeen: Why don't you tell us about just what you know about the thing. You knew it was gonna happen, we know that.

Bainbridge: No, I didn't know it was gonna happen. If I knew, I wouldn't have gone in the first place.

Killeen: Well, like I'm saying, it's one thing to rob somebody, it's another thing to kill somebody. When you went in there you knew the robbery was goin down.

Pfeiffer: You didn't know he was gonna kill her, but you knew the robbery was gonna go down, didn't you?

Bainbridge: No.

Pfeiffer: The money drop was gonna be there at the same time?

Killeen: You needed money. You needed money to fix your car?

Bainbridge: I wasn't worried about fixing, needing money to fix the car. I knew...

Killeen: Then why did you take $37.00 from...

Bainbridge: Ah, he's the one that went ahead and paid for it. I just wanted to see how much the prices were. We went to two places.

Killeen: Why did you take it from him though?

Bainbridge: Huh? He said he was gonna pay for it.

Killeen: Didn't that bother you? Money from just killing a girl and taking the money and then he buys this thing for you. That's blood money.

Bainbridge: Yes it is.

Killeen: Why'd you do it?

Bainbridge: I didn't even...

Killeen: Didn't think about it?

Bainbridge: No, cuze I didn't even want to even think of what just happened. I didn't even want to...

Killeen: The thing of it, Randy, is that you didn't think about anything, according to what you're telling us. We know you did.

nbridge: I had nothing on my mind because I didn't want, I just wanted to stay completely away from it and stay out of it. I didn't want to have nothing to do with it.

:leen: But yet you went out with Lacey Sivak a couple of hours before any place opened. But you went over there to that gas station first, after you'd already discussed with Lacey.

inbridge: Not that day.

lleen: No, but the week before.

inbridge: I didn't think, I thought it was just, just a joke of some kind cuze I didn't think it was...

lleen: And here's a situation too where we're laying all kinds of opportunity you could have walked out fifteen different times when you were with Lacey and a thousand different times you could have gone to your parole officer. You could have gone to the police after you walked away from him.

:inbridge: Yea.

illeen: You had every opportunity. You know it as well as we do and that's why it's not washing, Randy. It's just not washing and that's why...

ainbridge: Cuze I didn't run, man? The guy had a gun, man, I ain't gonna let him shot me.

illeen: Ah-huh.

ainbridge: He shot the lady. I didn't, I didn't know, I ah he just shoot, shot at, I didn't know it was completely empty. I didn't...

illeen: Yea, but a minute ago....

ainbridge: And he...

:illeen: A minute ago you told, Dee...

ainbridge: He emptied out the gun, yea.

illeen: A minute ago, when she was calling for help, if she just would've just called your name, you said you would have gone in there and

beat upo[redacted]

Bainbridge: I would've too.

Killeen: But that's a thin line.

Bainbridge: That's why I wanted to go out. That's what, at that time I was, I was prepared to leave and...

Killeen: You told me yesterday that he had his back to you when he was knifing her. All it would have taken for you to take two steps forward and you could have been on top of him, but you didn't.

Bainbridge: Well, I'm not that kind of person. I'm not a viol...I didn't know what to do. I didn't, man. I never been in that position before.

Killeen: You never even told him "don't, stop doing that". You never even said one word.

Bainbridge: Cuze I wasn't, I wasn't even suppose to be involved. I was just gonna go fix my van that day. I didn't, I didn't know what was gonna go, what was goin on.

Killeen: Then he was in the room all by hisself with her and you could have walked out that door, gone to the first telephone and called without any danger to yourself.

Bainbridge: Right around the side of the station, but I didn't think of that because I was too afraid of him.

Killeen: But instead you chose to go out with him afterwords and let him buy you items to fix your car with the money that was taken from the...

Bainbridge: He was the one that offered to do it. I just said, I just wanted to see about, all I was gonna do was see how the trade-in was gonna go in for my old starter and see how much it'd cost because my old lady would get paid Wednesday, Thursday or Friday of that week.

Killeen: Uh-huh.

Bainbridge: But next week, and we had a few, a little bit of money in the bank in case we needed it, which we did. So I was gonna ask her about it when I got home. Well, he says well here, I'll pay for it.

Killeen: Uh-huh.

Bainbridge: And he went ahead and I gave him a funny look because I didn't know what was goin on cuze I'd, I had remembered that he had stole the money.

Killeen: You had remembered that?

Bainbridge: Yes, because I was, I needed the money to get the starter for it so I could have the van to get my old lady back and forth to work.

Killeen: When we put you on the lie detector, is that lie detector gonna tell us that you're telling the truth about when you walked out of there? I bet you...

Bainbridge: It is, it will, man.

Killeen: What if it's, what if it doesn't? What if the lie detector says that you're not telling us the full truth? What happens...

Bainbridge: It can't because I have nothing to lie about. Cuze I didn't do nothing. That would mean probably why because I didn't do nothing. Maybe I should've, but I'm ain't that kind, I, I'm not a violent person. I ain't. Damn.

Killeen: Do you have any questions? Do you have any questions...

Pfeiffer: Yea, I do. When you, or when Lacey threw the knife off the bridge...

Bainbridge: Yes.

Pfeiffer: You told me yesterday, or last night, that ah that you were driving on Glenwood towards D'Alessandro's, right?

Bainbridge: Yes.

Pfeiffer: You also told me that he threw it off the right side of the bridge?

Bainbridge: Yea.

Pfeiffer: Is that correct?

Bainbridge: Goin toward, yes.

Pfeiffer: OK, tell me approximately where this landed again. You told me once.

Bainbridge: About ten feet from the bridge. From the outs, from the outside of

the bridge. I was on that side, about ten feet from there. After he threw it, cuze I noticed his arm go out the window and he threw something over and I looked and I seen the knife fall down about ten feet from the edge of the bridge.

'feiffer: OK, is it near the center of the bridge or is it ah...

ainbridge: It was a little bit off from the center.

'feiffer: OK, was it like...

ainbridge: Because we were...

feiffer: Towards D'Alessandro's or the other way?

ainbridge: D'Alessandro's.

Pfeiffer: So it's more up, you're saying it's ten feet from the bridge, more towards D'Alessandro's from the center, is that right?

Bainbridge: Yes, not much though, cuze...

(End of Tape 1 Side 2 - Second Interview)

PFEIFFER: Your fingerprints aren't on that knife?

BAINBRIDGE: No. On nothing.

PFEIFFER: Did Lacey wipe any fingerprints off of that knife?

BAINBRIDGE: Not that I know of.

PFEIFFER: Were you guys listening for the radio?

BAINBRIDGE: He was listening since the radio was on.

PFEIFFER: Were you near it when Dixie was alive or dead?

BAINBRIDGE: I was very much so cause I liked the lady.

PFEIFFER: What did you think?

BAINBRIDGE: I knew that it, there was hardly no way at all that she could make it through.

PFEIFFER: Not with six shots in the head.

BAINBRIDGE: He went crazy, man. He just went crazy over the lady.

PFEIFFER: What did he think? Did he think she was dead?

BAINBRIDGE: I don't know. I don't.

PFEIFFER: Were you pretty mad at him?

BAINBRIDGE: I was upset. I was scared. I didn't want to be around him.

PFEIFFER: How come you didn't leave him? You had a lot of chances.

BAINBRIDGE: Cause he was giving me a ride. The only thing in the whole day that I knew of was that he was going to give me a ride to get my starter, to see about a starter in the van.

PFEIFFER: When did you make arrangements for him to come by and pick you up at 6:00 o'clock in the morning?

BAINBRIDGE: What arrangements? I didn't know he was coming. That's why I was still in bed asleep.

PFEIFFER: How did he know you wanted to fix your van?

BAINBRIDGE: He didn't.

PFEIFFER: How did he know to come by?

BAINBRIDGE: He didn't.

PFEIFFER: You're saying he came by.

BAINBRIDGE: I heard a banging on the door one morning and I woke up and went in there and it was him and I go "Whats going on?" and I said "Could you run me to the, to see about my starter?" since that was mostly on my mind for the last few days anyway.

PFEIFFER: Had he ever come by your house before at 6:00 o'clock in the morning?

BAINBRIDGE: No.

PFEIFFER: Did you think that was a little unusual him coming by at 6:00 o'clock in the morning?

BAINBRIDGE: I didn't look what time it was.

PFEIFFER: Well, how do you know what time it was?

BAINBRIDGE: It had to be about 6:00 o'clock cause thats how I felt. I usually felt the same way when I got out of bed when I went and took Ruby to work, around 6:00, a little before, a little after. About that time. Daylight was just about, it wasn't quite there but it was getting there. It was pretty, it wasn't far from daylight, daybreak and - I was, I figured, I didn't look at no clock or nothing. Just, I just figured thats about the right time.

PFEIFFER: Why do you suppose he got up at 6:00 o'clock in the morning?

BAINBRIDGE: I don't know. I didn't have nothing - I don't even know the guy hardly. I don't even know why - I didn't even know he was coming.

PFEIFFER: I think you guys had it planned.

BAINBRIDGE: I didn't have it planned. I did not. Honestly. I had no reason to plan nothing.

PFEIFFER: You needed the money.

BAINBRIDGE: Cause I - Huh?

PFEIFFER: You needed the money. You had it planned.

BAINBRIDGE: Naw I didn't need the money.

PFEIFFER: How you gonna buy a starter if you don't have any money?

BAINBRIDGE: Ruby was gonna pay for it.

PFEIFFER: Did you talk to Ruby about the starter?

BAINBRIDGE: Yes. I did -

PFEIFFER: When was she going to give you the money?

BAINBRIDGE: Huh? When I needed it. When I went and found out about what the price would be on it. I wanted to go to the cheapest place so I'd have to be shopping around.

KILLEEN: You just said before that she wasn't going to get paid for several days yet.

BAINBRIDGE: No, we had some money in the bank already.

KILLEEN: How much money in the bank?

BAINBRIDGE: I don't know. Not over $50.00.

KILLEEN: Not over Fifty bucks? How much exactly?

BAINBRIDGE: I don't know - I don't take care of the checkbook.

KILLEEN: Savings account?

BAINBRIDGE: Checkbook.

KILLEEN: Checkbook?

BAINBRIDGE: We have a checking account. It was Ruby's. I think we maybe had about forty, I think. The last time I remember her drawing and puttin money in the bank. But she might have had a little more from the week before cause you can't draw out all of the money from a checking account.

PFEIFFER: Why don't you want us to know -

BAINBRIDGE: Know what?

PFEIFFER: About that robbery.

BAINBRIDGE: I want you to know it all. I want you to know everything and I want to prove it to you so that, to show you that I ain't involved at all in it. I just wanta, happened to be an innocent bystander there and I don't kill people for noth - for money.

PFEIFFER: When was the first time you saw that .38?

BAINBRIDGE: Oh, I don't know when it was. -

PFEIFFER: That day, that morning.

BAINBRIDGE: When he, when he hid it. He hid it in the carbu- air cleaner of the car. -

PFEIFFER: That was a pretty good sized revolver, you know. Thats a pretty big gun.

BAINBRIDGE: It was. Yes it was. Uh -

PFEIFFER: You saying you didn't know he had that when he walked inside?

BAINBRIDGE: The pistol? No. I didn't see him with it.

PFEIFFER: Where did he have it? (Long pause) Where would he have put that to conceal it?

BAINBRIDGE: I don't know where, he put it back - I don't know. I didn't

see where he could have it, to conceal it. I didn't even know that was what he was going in there for. -

PFEIFFER: Were you -

BAINBRIDGE: I thought it was just a bunch of, I thought it was just a bunch of bullshit he was talking about, robbing somebody. I did, I thought it was just bullshit.

PFEIFFER: You and he have talked about Dixie before. Cause you told him that you thought she was a pretty nice lady.

BAINBRIDGE: Yeah.

PFEIFFER: So you've talked about it.

BAINBRIDGE: Oh, the week before he was asking me - no, it wasn't then that it came up. I think I brought it up because it was a place where he used to work. I told him, I says, I says, yeah, I kinda like the lady. She's kinda cute.

PFEIFFER: You liked, liked her a lot.

BAINBRIDGE: YES, I DID.

PFEIFFER: You liked her a whole lot...

BAINBRIDGE: YES, I DID. She was a nice lady.

PFEIFFER: because you, you told us that she even kinda turned you on.

BAINBRIDGE: She did.

PFEIFFER: And that she let you touch her.

BAINBRIDGE: I mean, well thats maybe a little stretched. I just thought I just got to touch her and I'd been in prison for a while in Oregon State and, I hadn't been able to touch anybody and I thought I would touch this lady, and, I do see the things that I touch and understand the idea that may, may be a little closer to me because the idea that I got to touch them. ...

PFEIFFER: Does Ruby let you touch her?

BAINBRIDGE: Yeah, I touch Ruby. She's my old lady.

PFEIFFER: Did you like to touch Ruby?

BAINBRIDGE: Yes.

PFEIFFER: You wanted to touch Dixie too, didn't you?

BAINBRIDGE: That day?

PFEIFFER: Well, any time.

BAINBRIDGE: No. Not really. I had already - I shook her hand and stuff like that, when she paid for - when I give her the money back for when she give me $5.00 worth of gas. And, that was mostly the day I recall it because when I. I didn't just grab ahold of her hand when I shook her hand.

PFEIFFER: Well that's what I'm trying to say. You, you and her were really good friends.

BAINBRIDGE: Yes, we were.

PFEIFFER: And I think you were kinda infatuated with her.

BAINBRIDGE: Yeah.

PFEIFFER: I think that you kinda thought about her, maybe fantasized a little bit about her.

BAINBRIDGE: Naw, I didn't fantasize or nothing.

PFEIFFER: Well, you know, we all fantasize. I'm not saying that you thought anything bad of her, ...

BAINBRIDGE: No, I, I didn't fantasize with her, because I just knew - if I wanted to talk with her or anything she was right there.

PFEIFFER: Didn't you kinda think she would be fun to take out on a date?

BAINBRIDGE: Not really.

PFEIFFER: You're telling me that you didn't ...

BAINBRIDGE: It's kinda a motherly type, its kinda a, a friendly relation type thing.

BAINBRIDGE: No. It wasn't that kind of a relationship.

PFEIFFER: Why did you ask me what kind of a husband Ruby had?

BAINBRIDGE: Ruby had?

PFEIFFER: Or, no. I'm sorry. What, what kind of husband Dixie had?

BAINBRIDGE: Cause I wanted to meet him. He must have been a very nice person because of the relation I got of her. The friendly relationship that we had. He had to have been a very nice man.

PFEIFFER: Well...

BAINBRIDGE: And I was more or less proud of it and I wanted to know who he was, kinda, to where I, I could get a little more information about her and talk about it, because she was a nice related person.

PFEIFFER: You wanted to know more about her, didn't you?

BAINBRIDGE: Yes, I did.

PFEIFFER: Cause you enjoyed being with her.

BAINBRIDGE: Yes, I did.

PFEIFFER: You enjoyed talking to her.

BAINBRIDGE: Yes.

PFEIFFER: And you were kinda attracted to her physically.

BAINBRIDGE: Well, I don't know if you would put it that way - attracted to her physically. But, uh, I liked the relationship that we had. We were real friendly, jokingly, the relationship that we had, joke or be serious any time we wanted to and we both understood it. (crying)

PFEIFFER: ....

BAINBRIDGE: Thank you.

KILLEEN: I got a problem, Randy, with when you were inside there -

PFEIFFER: Would you like to spend some time with her?

BAINBRIDGE: No.

PFEIFFER: You didn't want to spend any time with her?

BAINBRIDGE: No. I didn't want to sleep with her or spend any time with her of any kind because she wasn't that - didn't, didn't hit me like that kind of a lady, not that kind of a turn on. She was a very, very nice gentle lady.

PFEIFFER: Well, you said yourself you just got out of the penitentiary in Oregon...

BAINBRIDGE: Um..

PFEIFFER: and I imagine that you were kinda lonely.

BAINBRIDGE: Naw, I wasn't really lonely. I have an old lady and I happen to be seeing this other lady and making love to both of them. I been pretty satisfied in my love relationship with women.

PFEIFFER: One of the first things you told us...

BAINBRIDGE: Yeah?

PFEIFFER: when we were talking about Dixie, and you were telling us about how you liked her...

BAINBRIDGE: Yeah.

PFEIFFER: you said "Don't tell Ruby."

BAINBRIDGE: I said that?

PFEIFFER: You sure did.

BAINBRIDGE: I didn't tell her that.

PFEIFFER: Yeah, we were in the car...

BAINBRIDGE: I don't remember that. I don't remember you saying that. Ruby knew I liked the lady. She knew a lot cause I used to talk about it.

PFEIFFER: Did you ever ask Dixie to go out with you?

these people came up and paid for the gas. Go ahead and light your cigarette. You said when you first walked in there, right away when you first walked in there that he took his gun out and took her into the back room.

BAINBRIDGE: Naw. Not right away.

KILLEEN: What happened right away? Tell me the first thing that happened when you walked in there.

BAINBRIDGE: I went over and I said "Good morning" and she said "Good morning" and I went over to get a cup of coffee and, uh, he said good morning and all of a sudden somebody came to the window that happened to a been out there getting gas and he paid for the gas and stuff like that and, there was no. - she said thank you to the guy, and the guy said ok after he give her the money and then was when he said "I'm sorry about this" and then he put the gun, and then the gun was up there on the counter and he pushed her in the other room.

KILLEEN: You're sure about that?

BAINBRIDGE: After the guy left, yeah.

KILLEEN: And then what happened? Is that when he took her into the back room?

BAINBRIDGE: No, she asked what was going on and he says, why don't, why don't you step back there in the other room and she says, Well, ok and it took her a few seconds to get up and she wasn't too hasty and she went back there and thats when he hit her in the head.

KILLEEN: What about the guy that came in?

BAINBRIDGE: He had already left?

PFEIFFER: Huh?

KILLEEN: You never even, you never even told us - you mean when the guy came up to the window?

BAINBRIDGE: Yeah.

KILLEEN: I'm talking about the guy who came inside. What about him?

BAINBRIDGE: He just came in and paid for his bill.

KILLEEN: Just came in and paid for his bill! That's a pretty important thing you're leaving out there.

BAINBRIDGE: Yeah.

KILLEEN: I just asked you the...

BAINBRIDGE: Well, I'm sorry. I see what you mean by leaving out...

KILLEEN: well, why don't you, why don't you tell me what happened about that.

BAINBRIDGE: Ok. There was about three people that came up there before he done anything to her.

KILLEEN: Alright. What about the guy that came inside. Tell me about that.

BAINBRIDGE: He looked at both of us and I was still standing over there. I hadn't gotten coffee or nothing yet and, uh, he says well 8 hours is enough or something like that. I didn't exactly notice what he said and he paid for it and she said "Thank you." And all I could get was he turned around and left.

KILLEEN: All you could get ...

BAINBRIDGE: He turned around and walked away.

KILLEEN: You're saying all you...

BAINBRIDGE: I didn't, I wasn't watching him or anything like that.

PFEIFFER: She was scared to death then, how come? She was...

BAINBRIDGE: I didn't know she was scared.

KILLEEN: She was scared to death. She was trembling. Sure she was. You know she was.

BAINBRIDGE: No, I don't know that she was scared. I didn't -

KILLEEN: The guy knows. The guy that paid her the money. He noticed it.

BAINBRIDGE: Yeah?

KILLEEN: She was scared. ...

BAINBRIDGE: I didn't see that.

KILLEEN: Something was wrong. Something was really wrong.

BAINBRIDGE: Yeah?

KILLEEN: So wrong, in fact, well this fellow thought about coming back in just to check on her welfare. He knew something was wrong.

BAINBRIDGE: Yeah.

KILLEEN: There's no doubt about it. Now, why? ...

BAINBRIDGE: Well, probably where he was standing...

KILLEEN: Why weren't things hunky-dory?

BAINBRIDGE: Probably where he was standing cause he was standing ...

KILLEEN: What was the window - what was said. What was said before that man came in. What was said to her to make her so scared?

BAINBRIDGE: I don't remember nothing that was said that would have made her scared.

KILLEEN: Nothing at all?

BAINBRIDGE: Un-huh.

KILLEEN: He didn't say anything to her?

BAINBRIDGE: Un-huh.

KILLEEN: You didn't?

BAINBRIDGE: I, when he came in, what's it Lacey? is his name?

KILLEEN: You know his name.

BAINBRIDGE: Just stood there. I can't remember his name. I apologize for that.

KILLEEN: Ok.

BAINBRIDGE: Buck its Lacey, right? Well, he was standing up there with his arms crossed when the guy come in and looked kinda puzzled. Not that much puzzled. I was mostly looking at him because he was the one that had the gun that, that he was gonna use on the lady. I didn't even know he had the gun at the time but I knew he had the knife. -

KILLEEN: Why did you know he had the knife he was gonna use?

BAINBRIDGE: Cause he showed me the week before, he showed me the knife cause he was gonna use it.

KILLEEN: Was that the same knife he was planning on using?

BAINBRIDGE: From what I recollect, yes, it was.

KILLEEN: Ok. You knew that he was, you knew he had the knife that day?

BAINBRIDGE: Yeah, but I thought it was just a pocket, I didn't know he ...

KILLEEN: How did you know he had the knife that day?

BAINBRIDGE: I didn't know.

KILLEEN: Wait a second. Wait a second. You just told me you knew he had the knife. You just made that statement.

BAINBRIDGE: Yeah? I made that up then because I didn't know for sure that he had the gun, knife because I thought it was just his pocket knife that he had before cause he took it out of his right pocket before.

KILLEEN: Why would, why would Dixie be scared to death of it?

BAINBRIDGE: I don't know. I really don't. Honestly I don't.

KILLEEN: What did you say to the guy when he came up and paid?

BAINBRIDGE: How you doing, I think I said.

KILLEEN: You said how're you doing?

BAINBRIDGE: If anything. I ain't sure. I'm not positive that I did say it ...

KILLEEN: I don't want to put words in your mouth. I just want to know if you did say it.

BAINBRIDGE: That's what I say, cause I don't remember saying anything.

KILLEEN: What about Lacey. What did he say?

BAINBRIDGE: Nothing. ...

KILLEEN: Did he smile or anything?

BAINBRIDGE: that I know of.

KILLEEN: Did you shake your head saying like how do you do, nod?

BAINBRIDGE: No, I didn't.

KILLEEN: Nothing at all?

BAINBRIDGE: No. I didn't even know the guy. He just came in to pay for his tab.

KILLEEN: But she was scared to death at that time. Is that because Lacey had already said something to her?

BAINBRIDGE: I don't think so. I ain't sure. But I don't think it was. I really don't.

KILLEEN: When one of those cars pulled up, that car the old lady was driving.

BAINBRIDGE: Yeah.

KILLEEN: Remember that?

BAINBRIDGE: No. I remember somebody pulling up.

KILLEEN: A blue pick up truck, an old lady in a blue pick-up truck.

BAINBRIDGE: Blue pick-up truck?

KILLEEN: Yeah.

BAINBRIDGE: The one that left?

KILLEEN: This is the one, .

BAINBRIDGE: She seen, she seen me, just as she was coming in on the far side...

KILLEEN: That was after Dixie was already stabbed, right?

BAINBRIDGE: Yeah. I think it was.

KILLEEN: Did you walk towards that lady?

BAINBRIDGE: Well, at an angle I walked to towards her.

KILLEEN: Why?

BAINBRIDGE: I was leaving. Cause he had already killed a lady, man, I didn't even want to be involved and the lady pulled in and pulled back out and I seen her because I was in the process of leaving cause I was over here, leaving, in the process of it.

KILLEEN: Where were you going?

BAINBRIDGE: Huh?

KILLEEN: Where were you going?

BAINBRIDGE: I wanted to go get my start - I wanted to get out of that place because the guy had just shot and killed this lady...

KILLEEN: You were talking about you were in the process of leaving. What happened?

BAINBRIDGE: Well he had killed that lady. He had just...

KILLEEN: I know that, but what were you doing, where were you going? You said...

BAINBRIDGE: I was gonna leave and go home and find somebody else to give me a ride over there? Huh?

KILLEEN: Why didn't you, why didn't you?

BAINBRIDGE: I was scared.

KILLEEN: Wait a second. Wait a second. You're confusing me because all of a sudden we've got someone watching you walk out of the place and you said you were walking towards the lady because you are leaving the place and now you're saying you were scared.

BAINBRIDGE: I was scared. Yes I was.

KILLEEN: What did you do though?

BAINBRIDGE: Huh? Just stood there and I was in the process of leaving.

KILLEEN: Then you stopped.

BAINBRIDGE: I was over by the door and I was on, I was, well, I wasn't even, well, I was in between the door and the desk. I was about - how, I was getting in the process of leaving because he had gone and shot the lady and everything, and I seen this lady and I hoped she had seen me because I stared at her...

KILLEEN: Um-hum.

BAINBRIDGE: And she stared at me. So, cause I wanted her to see me to know that I was at least there and I knew what was going on.

KILLEEN: Um-hum. So, is that the same reason you didn't call the police.

BAINBRIDGE: Cause I knew something had already, people had already seen it.

KILLEEN: I see. But is that the same reason you called, didn't call the police and tell this is what happened?

BAINBRIDGE: I didn't think it would, the police wouldn't be involved. Thats why I wanted to tell my parole officer.

KILLEEN: The police wouldn't be involved in a MURDER/ROBBERY?

BAINBRIDGE: They couldn't, I didn't think, I don't feel those same police officers has that must judgment. I don't like city police officers because they bullshit.

KILLEEN: Do you, do you feel because you don't like police officer, city police officers, that they are not involved in handling investigations in the city?

BAINBRIDGE: Well I didn't know because I never -

KILLEEN: Do you think a parole officer would have handled that investigation?

BAINBRIDGE: A lot better, yes, I thought -

KILLEEN: I'm not asking, no, I'm not asking you that? Did you think your parole would normally handle that investigation.

BAINBRIDGE: No, he wouldn't.

KILLEEN: Who would normally handle that investigation?

BAINBRIDGE: Investigators.

KILLEEN: Who? From where?

BAINBRIDGE: From the city. Garden City.

KILLEEN: Why didn't you go to the investigators from city, Garden City?

BAINBRIDGE: I didn't know, see, that's why I wanted to go and see my parole officer and I would talk to him and he would know who to talk to.

KILLEEN: Why didn't you go...

BAINBRIDGE: And he would get a hold of them.

KILLEEN: We're going back over circles again...

BAINBRIDGE: Yeah?

KILLEEN: because why didn't you go to your parole officer?

BAINBRIDGE: I wanted to tell him. Because he has legal right of knowing everything. And, he's the one I could talk with and conversate with and that will understand how I'm talking and what I need.

KILLEEN: But you, but you never told your parole officer that until you were at the Law Enforcement Building, did you?

BAINBRIDGE: Not really. no.

KILLEEN: Ok.

BAINBRIDGE: But I called and said I wanted to talk to him, right off. I just wanted to cause I didn't like the situation that was coming down.

KILLEEN: Excuse me. (Aside to Pfeiffer) Do you have any other questions.

PFEIFFER: I just don't understand what you were saying about leaving, you

were gonna leave, you were walking toward that lady because you were scared and...

BAINBRIDGE: Yeah.

PFEIFFER: And you're saying you didn't leave because you were scared...

BAINBRIDGE: Cause the lady just pulled in and left. I, I only wanted to leave because there was somebody there who was a witness.

PFEIFFER: You had a lot of chances to leave.

BAINBRIDGE: I know I did but I was too scared, man. I didn't know what to do. I never been in that position before and I ...

PFEIFFER: What were you scared of? What were you scared of?

BAINBRIDGE: The guy had GUN, man, and a knife, and -

KILLEEN: I want to know exactly what you were scared of? What were you scared of? What were you afraid of? Tell me exactly what you were afraid of.

BAINBRIDGE: The guy that just got thorough, Lacey that just got through assaulting a lady -

KILLEEN: What do you think, what do you think he would have done to you? Tell me. What do you think he would have done to you?

BAINBRIDGE: I don't know. I didn't want to find out.

KILLEEN: You were ascared of something. You've gotta -

BAINBRIDGE: Yeah, of him.

KILLEEN: Yeah, but in your mind - what were you afraid of though?

BAINBRIDGE: He had just killed a lady, man. That has a lot to do with ...

KILLEEN: What do you, what do you think he would have done to you?

BAINBRIDGE: He would have had to kill me because I witnessed it.

KILLEEN: Because you were scared.

BAINBRIDGE: Yes I was scared.

KILLEEN: And thats the reason why you never ran away from him. Because you were scared.

BAINBRIDGE: A[redacted]

KILLEEN: And what?

BAINBRIDGE: I was scared, in a shock of form or something because I was scared to death. I didn't want to -

KILLEEN: But that doesn't wash with the 2 1/2 days you spent when Lacey Sivak went off to do other things and you were all by yourself for 2 1/2 days. There was nobody there with a gun, nobody there with a knife...

BAINBRIDGE: Um-hum.

KILLEEN: Nobody threatened you. He never threatened you to begin with anyway. He never even pointed the gun at you or took the knife at you.

BAINBRIDGE: Yeah.

KILLEEN: None of this ever happened so all of a sudden, what, what explanation do you have for this. You are contradicting yourself. There is no explanation. is there?

BAINBRIDGE: Not that I know of. I don't, I don't see no explanation for what you -

KILLEEN: There's no explanation for not telling what happened to somebody afterwards.

BAINBRIDGE: I want to tell my P.O. That's the only one I, I'll -

KILLEEN: But you never told your P.O. And you've had the opportunity.

BAINBRIDGE: I was scared even. Even with that. That's why I, we -

KILLEEN: Why?

BAINBRIDGE: was out in the hall, out in the driveway at first and I, my old lady was in the van and I didn't want to say nothing right there and so we went on into the hall...

KILLEEN: Let me ask you, let me ask you this. You were scared for something happening to you, like getting shot, after you left

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Lacey, or were you...

BAINBRIDGE: Yeah.

KILLEEN: scared. Is that the reason why you didn't tell anybody or were you afraid because if you told somebody you would get arrested for this. And you'd be charged with a crime...

BAINBRIDGE: I was afraid, afraid he was gonna do something if I said anything to the police or anything so I wanted to talk to my Parole Officer which is very private and he would get it taken care of for me.

KILLEEN: Does Lacey Sivak scare you?

BAINBRIDGE: Yes, he does.

KILLEEN: Why?

BAINBRIDGE: Cause he killed a lady, man.

KILLEEN: Um-hum.

BAINBRIDGE: And he didn't have no feelings about it - even ...

KILLEEN: Would you like, would you like to see Lacey Sivak come to justice and be tried?

BAINBRIDGE: Yes I would very honestly, because I don't believe in killing people. There's no reason for...

KILLEEN: How did you feel two days ago? Did you want Lacey Sivak to be arrested and have justice?

BAINBRIDGE: Yes I did.

KILLEEN: Did you feel that you had information that could cause him to come to justice?

BAINBRIDGE: That's right. That's why I wanted to talk to my parole officer...

KILLEEN: And you did do something about it - you...

BAINBRIDGE: Cause he would have brought it down.

KILLEEN: Did you talk to your parole officer?

BAINBRIDGE: about it, no.

KILLEEN: But did you talk to him?

BAINBRIDGE: Yes.

KILLEEN: Ok.

BAINBRIDGE: I think it was that very same day.

KILLEEN: Ok.

PFEIFFER: Did Lacey tell you not to talk to the police?

BAINBRIDGE: No.

PFEIFFER: Did he threaten you?

BAINBRIDGE: No.

KILLEEN: Did you tell him not to talk to the police?

BAINBRIDGE: No.

PFEIFFER: Did you tell him that you wouldn't tell?

BAINBRIDGE: No, I didn't say that either.

PFEIFFER: Think about that before you answer because...

BAINBRIDGE: Because I think, yeah, maybe I might - no, there was nothing like that.

PFEIFFER: Didn't Lacey say something to you like, uh, like you getting in this just as deep as I am and, uh, and, uh. you'd better not talk?

BAINBRIDGE: No.

PFEIFFER: Well, you must have figured that out all on your own then, cause you didn't talk.

BAINBRIDGE: No, cause I was scared. I don't know where he lived, where he came from, where he first started to come from or anything. And I didn't want to take the chances of getting in any, any trouble with him with the idea that he would kill me just like he did her.

KILLEEN: Let me ask you this...

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BAINBRIDGE: And he was brutal to her.

KILLEEN: Let me ask you this. Randy, when the, when we came over to your house yesterday, told you who we were and that we wanted to talk to you. ...

BAINBRIDGE: Yeah.

KILLEEN: You told us "It must be about Dixie down the street and what happened down there at the robbery." That's what you said right away.

BAINBRIDGE: When?

KILLEEN: When we came down to talk to you yesterday, at your house, you said "It must be about that robbery and killing that happened."

BAINBRIDGE: Um-hum. I wanted, I wanted to tell, man.

KILLEEN: Did you tell us then?

BAINBRIDGE: No. I didn't tell you then.

KILLEEN: Why not?

BAINBRIDGE: Cause I didn't know you.

KILLEEN: Huh?

BAINBRIDGE: I didn't know you.

KILLEEN: You mean you gotta know somebody to tell them that?

BAINBRIDGE: I gotta, yes, I do. I'd, I'd rather know what the guy is for and what he's doing and, and, what, what senses he has on her.

PFEIFFER: Why didn't you sit down and talk to Ruby about it?

BAINBRIDGE: Cause I thought it might hurt her very bad. Which it does already.

PFEIFFER: Why didn't you tell your father?

BAINBRIDGE: I haven't seen him.

PFEIFFER: Your mother?

BAINBRIDGE: My mother - I just see her a little bit.

PFEIFFER: Why didn't you tell somebody?

BAINBRIDGE: I did.

PFEIFFER: Who.

BAINBRIDGE: I didn't want to be involved with it. That's what I told her. I even told her. I said No, I don't want to be involved with it because the guy wants to kill a person, man.

PFEIFFER: Who did you tell?

BAINBRIDGE: Her name is Mary.

PFEIFFER: Mary who?

BAINBRIDGE: I don't remember her last name. She lives up by the cemetery. I was helping her move.

KILLEEN: _____ __ _____ __ ____. You told her everything?

BAINBRIDGE: Not really everything. I just told her that this, uh, guy wanted me to kill somebody and I didn't want to be involved with it and I wanted to see what she had to say and I says Yeah, this guy wants me to kill this person and she says, Well, I really don't want you to do it. And I says, Ok. and thats all that was said about it. And the next day I come up and I told her No, I says I don't want to do it.

PFEIFFER: Was this before she was killed or after?

BAINBRIDGE: This was before. Somebody was supposed to have gotten killed - I knew that somebody was gonna get killed...

PFEIFFER: So you knew a long time ago then that he wanted to kill her...

BAINBRIDGE: A week before. That week before he said he wanted to go over there and rob these people and he might have to shoot them and it might involve a murder,a killing...

PFEIFFER: Or cut their throat...

BAINBRIDGE: Yes, and, and uh, so I told Mary and Mary says, Well, I don't want you to do that.

PFEIFFER: Hold old is Mary?

BAINBRIDGE: And thats why - she's about 28 years old, 38 years old.

PFEIFFER: Where does she work?

BAINBRIDGE: Naw, she ain't working.

PFEIFFER: Does she have kids?

BAINBRIDGE: Yes. ...

PFEIFFER: Where is she living?

BAINBRIDGE: She'd just been moved, she just moved in about maybe one half to two blocks on the other side of the cemetery. Right on the corner. There is an empty house beside it. And, its a little one, a little house.

KILLEEN: Is it in the middle of the cemetery or on the side?

BAINBRIDGE: No, you go by the cemetery, the cemetery is _____ you go by it like this,

KILLEEN: Yeah.

BAINBRIDGE: And you come up to right about here, and on the corner, there is a pick-up sitting here a few houses before it.

KILLEEN: Ok, wait a second.

BAINBRIDGE: She's right on the corner.

KILLEEN: Here is the cemetery, ok.

BAINBRIDGE: Yeah. And you drive down this side of it.

KILLEEN: Ok, here is the front of the cemetery. The front where they've got the, you know, where you drive over ...

BAINBRIDGE: Oh, its over here, the road is over here in the front of it.

KILLEEN: The cemetery goes this way, with the road in front of it. Ok.

BAINBRIDGE: Ok. And we're going this, down this way.

KILLEEN: See, here is the traffic light, the traffic light is over here, right? Does Roosevelt ring a bell with you?

BAINBRIDGE: Yeah. The traffic light that turns down the hill.

KILLEEN: Yeah. Roosevelt. Ok.

BAINBRIDGE: Yeah. Thats...

KILLEEN: And how many blocks do you go up?

BAINBRIDGE: Maybe two at the most.

KILLEEN: And what kind of house is it?

BAINBRIDGE: Its a little brown, a green one right beside it. Its two tone brown and yellow or brown and gold.

KILLEEN: Two tone brown and yellow?

BAINBRIDGE: Her name is Mary -

KILLEEN: What kind of car is in front or anything like that?

BAINBRIDGE: A light blue Ford Galaxie, I think it is. Yeah, with a trunk that doesn't fit, smashed in, and I think thats about it. And the front end is smashed. And I'd love to see her.

MILLER: Go ahead and get it off your chest.

BAINBRIDGE: Well, I can't.

PFEIFFER: Did you tell her more than what you're telling us?

KILLEEN: Is there anything different that you told her than you told us?

BAINBRIDGE: I just told you briefly what I told her and there wasn't that much that I told her.

KILLEEN: Ok.

BAINBRIDGE: She's a very close related person.

KILLEEN: Ok. We're going to go ahead and end the interview. The time is approximately 1:25 p.m.

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APPENDIX E

19-2515. Inquiry into mitigating or aggravating circumstances -- Sentence in capital cases -- Statutory aggravating circumstances -- Judicial findings. --

(a) After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

(b) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(c) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(d) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(e) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(f) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed.

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration of the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding. [R.S., R.C., & C.L., §7992; C.S., §9036; I.C.A., §19-2415; am. 1977, ch. 154, §4, p. 390.]

18-4001. Murder defined. -- Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Tortue is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflect on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill. [I.C., §18-4001, as added by 1972, ch. 336, § 1, p. 844; am. 1977, ch. 154, § 1, p. 390.]

18-4002. Express and implied malice. -- Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. [I.C., § 18-4002, as added by 1972, ch. 336, § 1, p. 844.]

18-4003. Degrees of murder. -- (a) All murder which is perpetrated by means of poison, or lying in wait, or torture which is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

(b) Any murder of any peace officer, executive officer, officer of the court, fireman, judicial officer or prosecuting attorney who was acting in the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murder to be an officer so acting, shall be murder of the first degree.

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

(f) Any murder committed by a person while escaping or attempting to escape from a penal institution is murder of the first degree.

(g) All other kinds of murder are of the second degree. [I.C., § 18-4003, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 1, p. 588; am 1977, ch. 154, § 2, p. 390.]

18-4004. Punishment for murder. -- Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life. Every person guilty of murder of the second degree is punishable by imprisonment not less than ten years and the imprisonment may extend to life. [I.C., §18-4004, as added by 1972, ch. 336, § 1, p. 844; am. 1973, ch. 276, § 2, p. 588; am. 1977, ch. 154, § 3, p. 390.]

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LACEY M. SIVAK
Petitioner,

vs.

STATE OF IDAHO
Respondent.

83-6326

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF IDAHO

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that petitioner be allowed to proceed in forma pauperis. Petitioner's affidavit is attached to this motion. Leave to proceed in forma pauperis was sought and obtained in all courts below.

DATED this 28th day of February, 1984.

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PETITION FOR WRIT OF CERTIORARI TO THE
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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

STATE OF IDAHO)
ss.
County of Ada)

I, Lacey M. Sivak, being first sworn, depoase and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

   The date of my last employment was February 15, 1981.

   The amount of salary and wages I received per month was less than $400.00.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

LACEY M. SIVAK

SUBSCRIBED and SWORN to before me this 24th day of February, 1984.

Notary Public for Idaho
Residing at Boise, Idaho

Kir. cwv 2

ORIGINAL

No. 83-6326

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No. 83-6326

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LACEY M. SIVAK,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

STATEMENT OF THE CASE

The petitioner, Lacey M. Sivak, was convicted of murder in the first degree and sentenced to death. The death sentence was affirmed on review by the Idaho Supreme Court. State v. Sivak, 674 P.2d 396 (Idaho 1983).

The evidence received at trial revealed that Dixie Wilson, an attendant at a self-service gas station, had been stabbed several times and shot several times. She was also sexually molested. 674 P.2d at 398.

The petitioner admitted being present, but claimed he had not committed the murder. However, the evidence against petitioner was strong. His fingerprint was found on the murder weapon, and the firearm used in the attack on Dixie

Wilson was found in a storage shed he had rented. Id. Moreover, appellant had previously worked at the gas station, had expressed animosity toward the victim, and had made a telephone call to inquire whether she would be on duty at the station the day of the attack. Id.

In his appeal to the Idaho Supreme Court, petitioner argued that the Idaho death sentencing statute was unconstitutional because it failed to include the jury in the sentencing process and that there was a state as well as a federal constitutional right to jury sentencing. He also made several constitutional attacks on the Idaho death sentencing statute that are not repeated here.

The Idaho Supreme Court rejected Sivak's contention that the Constitution required jury sentencing in capital cases. It also rejected the argument that the trial court's sentencing findings were inconsistent with the jury verdict. Petitioner presents the latter assertion here as an error of constitutional magnitude, but he did not base it on federal constitutional grounds in the state courts.

The court conducted an independent review of the death penalty and found that the sentence was not excessive or disproportionate to sentences imposed in similar cases. The court found no indication of the existence of arbitrary factors in the imposition of sentence. 674 P.2d at 404.

SUMMARY OF ARGUMENT

1. A sentencing proceeding is broader in the scope of the inquiry conducted there than is a trial. There is no constitutional prohibition which prevents a sentencing judge from finding that a killing committed during the course of a robbery was intentional, even though a jury, presented with alternative theories of first degree murder, chose the "robbery-murder" theory over the premeditated murder theory. In such circumstances, a finding of premeditation for the purpose of sentencing is not inconsistent with the conclusions of the jury based upon an inquiry more limited in its scope. Sivak did not present to the state courts the contention that the asserted inconsistency in the trial court's death sentencing findings violated his federal constitutional protection against being placed twice in jeopardy.

2. Petitioner did not raise, in the state courts, the claim that he was denied a supposed right to confrontation during the sentencing proceedings against him.

3. Neither the Sixth Amendment guarantee of the right to trial by jury nor the due process clause of the Fourteenth Amendment requires that there be jury participation in capital sentencing. The cruel and unusual punishment clause of the Eighth Amendment is concerned with the nature of punishment, not the question of whether a judge or jury shall conduct capital sentencing proceedings.

Judicial sentencing, in fact, is more likely to produce results free from arbitrariness and capriciousness in capital cases than is jury sentencing.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

Petitioner Was Not Denied a Constitutional Right to a Trial by Jury by the Court's Sentencing Findings, nor Was He Twice Placed in Jeopardy. Petitioner Did Not Present the Double Jeopardy Question to the Idaho Supreme Court.

Petitioner complains that the trial court, in the process of finding a statutory aggravating factor on which the death sentence imposed on him was based, reached a factual conclusion inconsistent with a factual finding implicit in the jury's verdict.

A brief summary of the pertinent state statutes as they were applied to petitioner's case may be a useful background. Under Idaho law, as far as is relevant here, murder in the first degree is either an unlawful killing with malice aforethought and premeditation or an unlawful killing with malice aforethought committed in the perpetration of a robbery. Idaho Code § 18-4003(a),(d). Robbery, in other words, is the equivalent of premeditation for the purpose of grading a murder as a first degree murder. In addition, a "robbery murder" is a capital murder if it is shown that the unlawful killing with malice aforethought, committed during a robbery, was accompanied by the specific intent to cause the death of a human being. Idaho Code

§ 19-2515(f)(7). Factual findings necessary to carry a first degree murder into the realm of capital murders are made by the sentencing judge, not the jury. Idaho Code § 19-2515.

The petitioner, Sivak, was charged under alternative theories, one based on premeditation and the other based on the "robbery murder" provisions of Idaho law. The jury chose to convict the petitioner of murder committed in the perpetration of a robbery. App. B, pp. B-14, B-16.* This circumstance leads the petitioner to the conclusion that the district court, at sentencing, acted inconsistently with the jury verdict and sought to make its own finding of premeditation to fill the gap left by the jury's failure to find "premeditated" murder. The petitioner's theory in this respect has reference to the court's finding in support of the statutory aggravating circumstance that the killing was intentional and knowing. The sentencing court, setting out factual occurrences that supported its finding of statutory aggravating circumstances under Idaho Code § 19-2515, observed that the defendant was known to the victim and could be identified by her if left alive after the robbery,

*The court instructed the jury that it could find Sivak guilty of both premeditated murder and murder committed during a robbery, as alleged in separate counts, or either. The court stated that there were distinct and separate theories as to how the murder was committed. Although the jury would have been justified in finding that Sivak committed a sing e first degree murder in two different ways, he obviously could not be punished twice for the same murder.

and that the murder was a calculated and intentional act. (App. B, pp.B-5, B-6.) Petitioner believes that this finding was tantamount to a finding of premeditation.

Petitioner identifies the right to a jury trial and the double jeopardy clause as the constitutional bases of his federal claims. This proposition includes the theory that the constitution forbids the sentencing court to make inquiries at sentencing any broader than the issue of guilt or innocence.

Because the jury had no fact-finding function at the sentencing phase of the proceedings, inasmuch as sentencing is a function of the judge, such findings as the court made at sentencing were original sentencing findings and the concept of inconsistency is out of place.

The remainder of petitioner's argument is contrary to one of the best-settled principles of sentencing law--that the court, in passing sentence, is to take account of all of the relevant factors relating to the offense and the offender. Williams v. New York, 337 U.S. 241 (1949); Roberts v. United States, 445 U.S. 552 (1980); United States v. Grayson, 438 U.S. 41 (1978); Idaho Code § 19-2515; State v. Johnson, 101 Idaho 581, 618 P.2d 759 (1980); State v. Wolfe, 99 Idaho 382, 582 P.2d 728 (1978).

This Court has said that the sentencing judge's inquiry is largely unlimited, either as to the kind of information which may be considered at sentencing or its source.

Roberts, supra; Grayson, supra. This principle certainly precludes a rule to the effect that, should the jury find the defendant guilty of capital murder not requiring premeditation, the court is therefore precluded from considering evidence of premeditation at sentencing.

Petitioner mistakenly relies on Presnell v. Georgia, 439 U.S. 14 (1978) and Cole v. Arkansas, 333 U.S. 196 (1948), to support his argument respecting the asserted inconsistency of the trial court's findings. The cases are not authority for petitioner's position.

Presnell was convicted of the murder of Lori Ann Smith and was sentenced to death by a jury on a finding that the murder had been committed during the commission of another capital felony, namely, the kidnapping with bodily injury of Andrea Furlong. In Georgia the commission of murder during the commission of another capital felony is a statutory aggravating circumstance authorizing the death penalty. It was alleged that the bodily injury aspect of the kidnapping was aggravated sodomy, and the jury was instructed that the death penalty for the murder of Lori Ann Smith depended upon the finding that the kidnapping of Andrea Furlong was attended by aggravated sodomy. The Georgia Supreme Court, without explanation, held that aggravated sodomy could not furnish the bodily injury element of "kidnapping with bodily injury," thus binding this Court. The Georgia court, nonetheless, upheld the death sentence on the theory that

there was evidence that Andrea Furlong had been forcibly raped during the kidnapping. The jury had in fact returned a "rape" verdict against Presnell, but because the jurors had not specified whether the verdict was one of forcible or statutory rape the Georgia courts treated the conviction as one of statutory rape. This meant that the rapes could not be considered to amount to "bodily injury" within the meaning of the capital sentencing statutes.

This Court vacated the death sentence imposed on Presnell for Lori Ann's murder. The Court held that principles of due process required that death sentences be evaluated on appeal as the issues were determined in the trial court. Quoting Cole v. Arkansas, 333 U.S. 196 (1948), the Court stated:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. [Cole v. Arkansas, 333 U.S. at [201-02]].
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> * * *
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> These fundamental principles of procedural fairness apply with no less force at the penalty phase of the trial in a capital case than they do in the guilty-determination phase of any criminal trial ...Presnell v. Georgia, 439 U.S. 14, 16.

The significant facts of Presnell were that in Georgia, in contrast with Idaho procedure, the jury was the fact-finder at sentencing, the jury did not find forcible rape had been committed, and the Georgia Supreme Court had, on

appeal, made a factual finding of forcible rape which the trial-level fact-finder had not. The purpose of the finding was to supply a necessary factual element for a sentence of death. This, said the court, was "procedurally" unfair.

Presumably the unfairness perceived in Presnell was involved with making factual judgments necessary to support a death sentence on appeal that contradicted those found in the trial court. Thus, the validity of Presnell's death sentence was not "appraised" in the Georgia Supreme Court "on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 201-202; Presnell v. Georgia, 439 U.S. 16.

It is obvious that this problem is not present in Sivak's case. In Idaho, the jury does not make factual findings for sentencing purposes. The only facts found in the sentencing phase of the case were those found by the sentencing judge. He was the only sentencing authority. There was no restructuring of facts previously found by an authorized fact-finder. Presnell is not authority for the theory that the sentencing judge must not consider evidence of the facts surrounding the offense merely because there is some possible debate about the implicit meaning of a jury verdict.

Presnell, in short, was a factual revision case. Examination of the charges, the verdict, and the court

sentencing procedures followed by the trial judge make clear that this one was not. Sivak was charged with two counts of first degree murder. By Count 2 (amended information), it was alleged that he murdered Dixie Wilson with premeditation. Count 3 was an alternative count by which it was alleged that the murder was one of the first degree because it was perpetrated by Sivak during the course of a robbery. Idaho Code § 18-4003(d).

Another flaw in petitioner's theory is its failure to recognize that the sentencing proceeding is not entirely analagous to the trial. As the Idaho Supreme Court said in a slightly different but highly relevant context, "[At sentencing] we are not concerned with proof of an element of the offense but rather are engaged in an inquiry into all relevant facts and circumstances which might weigh upon the propriety of capital punishment." State v. Osborn, 102 Idaho 405, 631 P.2d 187, 199 (1981).

The rule that the court is to consider all relevant evidence at sentencing, Roberts v. United States, supra; United States v. Grayson, supra; State v. Osborn, supra, precludes the theory that the sentencing fact-finder, whether it be a judge or jury, is constitutionally or otherwise prohibited from considering aggravating evidence of premeditation merely because the jury found the first degree murder to be one of the variety where necessary proof of premeditation was dispensed with because the legislature

had decided that an intentional killing during a robbery is tantamount to a premeditated murder.

Moreover, because the sentencing proceeding was an original fact-finding function of the judge at the trial level, Presnell, which involved appellate fact-finding inconsistent with facts found by the designated trier of fact, has no applicability.

Finally, the court's sentencing findings were not inconsistent with the jury's verdict.

The charge of murder in the first degree, of which appellant was convicted, was based on the fact that the murder occurred during the commission of a robbery. The robbery substituted for specific proof of premeditation, but it was nonetheless necessary for the jury to find that the killing was intentional. "Murder" is a killing with intent or an equivalent of intent, Idaho Code § 18-4001, and the jury was so instructed. Premeditation, it might be observed, is generally thought to involve a greater degree of deliberation than is to be found in second degree murders. People v. Robillard, 358 P.2d 295 (Calif. 1961); People v. Conley, 411 P.2d 911 (Calif. 1966). Accordingly, it has certain legal qualities differing from mere intent to kill and cannot be thought synonymous with the concept of intentional killing, as petitioner implies. See, also, State v. Carey, 91 Idaho 706, 429 P.2d 836 (1967); State v.

Hokenson, 96 Idaho 283, 527 P.2d 487 (1974); State v. Snowden, 79 Idaho 266, 313 P.2d 706 (1957).

The statutory aggravating factor which makes robbery-murder a capital offense is a specific intent to kill. Idaho Code § 18-2515. The jury thus determines, by its verdict, that the defendant committed an intentional killing or a killing manifested by extreme indifference to life, see State v. Hokenson, supra, during the commission of a robbery. But the jury does not resolve the specific question of whether the killing was intended or was the result of an equivalent of intent, such as extreme indifference to life. It need not make the distinction to find defendant guilty of a robbery-murder. Thus, when the judge goes on at sentencing to find that such a murder was a capital offense because it was connected with the specific intent to kill, he has gone beyond the fact-finding function performed by the jury, not acted inconsistently with it. The court was authorized to do so by statute. Idaho Code § 19-2515(f)(7).

Petitioner also contends that the asserted inconsistency in the trial court's death sentencing findings violated his federal constitutional protection against being placed twice in jeopardy. For the reasons previously stated, it is apparent that the sentencing proceeding is a different proceeding from that at which guilt or innocence is determined. The double jeopardy clause has no relevance

to such circumstances. We need not belabor the question further, however, because petitioner did not present a double jeopardy question in this context to the Idaho Supreme Court, nor did that court consider it. Accordingly, it is not appropriate for this Court to consider the question here. Street v. New York, 394 U.S. 576 (1969); Bailey v. Anderson, 326 U.S. 203 (1945); Michigan v. Tyler, 436 U.S. 499 (1978).

II.

The Petitioner Did Not Properly Raise the Right to Cross-Examine at Sentencing Proceedings.

Petitioner makes what respondent believes to be a legally incorrect argument about the application of the confrontation clause in capital sentencing proceedings. However, petitioner did not present this issue to the Idaho Supreme Court, nor did that court decide it. For those reasons, it would not be appropriate to grant a writ of certiorari addressed to the question. Street v. New York, supra; Bailey v. Anderson, supra; Michigan v. Tyler, supra.

Petitioner made an untimely attempt to raise a confrontation clause issue in a petition for rehearing presented to the Idaho Supreme Court, but the state court declined to grant a rehearing. (Petitioner's Appendix A, p.A-48.) One wonders how the court could have "reheard" what it did not initially hear on appeal. Idaho appellate

practice precludes raising issues for the first time on petitions for rehearing. Metropolitan Life Insurance Co. v. First Security Bank, 94 Idaho 527, 492 P.2d 1400 (1971); Johnson v. Bekins Moving and Storage Co., 86 Idaho 569, 389 P.2d 109 (1964), 7 ALR 3d 709, cert. den., 379 U.S. 913. Petitioner's procedural default in this respect precludes consideration of this claim in the United States Supreme Court. Michigan v. Tyler, supra.

III.

The Constitution Does Not Require that Death Sentences Be Imposed by Juries.

Petitioner argues that there is a constitutional requirement, found in the Eighth Amendment, and in the Sixth and Fourteenth Amendments, that sentencing in capital cases be performed by a jury. The argument comprises several specifications. It is urged:

(1) that a majority of states which authorize imposition of the penalty of death require the participation of a jury in the sentencing decision;

(2) that this court has transformed sentencing proceedings into something like trials; thus a sentencing scheme which involves only a judge in capital sentencing decisions violates the due process clause; and

(3) that "evolving standards of decency," by which cruel and unusual punishment clause cases have often been tested, require jury sentencing in capital cases.

A. Jury Sentencing in Other States.

Petitioner tells the Court that "it is of profound constitutional significance that Idaho stands with only a tiny minority of American states in wholly barring the jury from capital sentencing." (Petition for Certiorari, p.13.) However, unless constitutional questions are now being settled by counting up the number of states that subscribe to a particular practice--and we know of no authority for that proposition--the number of states subscribing to the notion that jury sentencing is desirable in capital cases is not only not of "profound constitutional significance," it is altogether irrelevant.

B. Sixth and Fourteenth Amendment Considerations.

Petitioner argues that the Sixth Amendment guarantee of a trial by jury and the due process clause of the Fourteenth Amendment require that death sentencing be done by juries. Reliance is placed on Bullington v. Missouri, 451 U.S. 430 (1981), which petitioner interprets as an expression by this Court that a capital sentencing hearing is, for constitutional purposes, a trial.

The Court's analysis in Bullington compares sentence fact-finding with trial fact-finding to bring into play the multiple punishments provisions of the double jeopardy

clause. Thus, when the fact-finder has found in defendant's favor on facts necessary to establish aggravating circumstances, the double jeopardy clause forbids the state from relitigating the factual issues identified and passed upon in the previous trial. This analysis applies only to the question of twice litigating aggravating facts when to do so might lead to a harsher sentence, and does not in any respect suggest that all of the evidentiary standards applicable to the determination of guilt or innocence are also applicable to sentencing proceedings. To reach such a result, the Court would have to have overruled Williams v. New York, 337 U.S. 241 (1949), which it has never done. The frequency with which the Court has directed attention to the continuing validity of Williams indicates that it has no intention of so doing. Roberts v. United States, 445 U.S. 552 (1980); Mullaney v. Wilbur, 421 U.S. 684 (1975); United States v. Tucker, 404 U.S. 443 (1972); Williams v. Oklahoma, 358 U.S. 576 (1959). See also, United States v. Horsley, 519 F.2d 1266 (5th Cir. 1975).

It is clear in this Court's decisions that a sentencing proceeding is not a "trial," and none of the cases cited by appellant stand for the proposition that the Sixth and Fourteenth Amendments require jury sentencing in capital cases.

C. The Eighth Amendment "Evolving Standards of Decency" Requirement.

Perhaps the most novel aspect of petitioner's argument that jury sentencing is constitutionally required in capital cases is his reliance on the "evolving standards of decency" referent of those cases which stand for the principle that the cruel and unusual punishment clause of the Eighth Amendment is to be applied by considering the extent to which public opinion has come to regard a particular kind or quality of punishment as abhorrent. In this context, this Court has pointed out:

> [t]hat the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra, at 101... . Thus an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. ...Gregg v. Georgia, 428 U.S. at 173 (1976).

It is apparent that the Court, in considering whether a particular penalty does or does not comport with the "evolving standards of decency that mark the progress of a maturing society," has been in each case concerned with the quality of the penalty provided and not with the question of what sentencing authority must decide upon the penalty. See, for example, Gregg v. Georgia, supra (capital punishment); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization); Robinson v. California, 370 U.S. 660

(1962) (imprisonment for status of being addicted to narcotics); Weems v. United States, 217 U.S. 349 (1910) (imprisonment in chains at hard and painful labor); Francis v. Resweber, 329 U.S. 459 (1947) (second attempt at electrocution).

It should come as no surprise that cruel and unusual punishment clause analysis has been thus limited because the language of the clause is addressed to the appropriateness of particular penalties:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S.Const., Eighth Amendment. (Emphasis added.)

Consistently the cruel and unusual punishment clause has been relevant to the assessment of barbarous metnods of punishment and, as the clause has taken on new meaning with the advancement of social conscience, to methods and varieties of punishment that are offensive in light of contemporary values. Gregg v. Georgia, supra.

Nothing in the history of the clause as it has been interpreted in this Court suggests that it has any relevance to the question of whether the sentence of death shall be imposed judicially or by a jury.

Nevertheless, the petitioner urges that the meaning of the clause must now be expanded to regulate a state legislature's choice of sentencing authority. In doing so, he ignores an admonition of this Court that mirrors a basic

principle of the division of powers between the legislative and judicial departments of government:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standard. "In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." [Citation omitted.] Gregg v. Georgia, 428 U.S. at 175 [emphasis added].

In the final analysis, whether the death penalty is imposed by a judge or a jury has nothing to do with whether the penalty is cruel and unusual. There is not a shred of evidence of any kind that judicial sentencing is more likely to result in arbitrary or capricious sentencing decisions than jury sentencing. Indeed, it has been suggested that the opposite is true:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function [citations omitted], but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analagous cases. Proffit v. Florida, 428 U.S. 242, 252 (1976), rehearing denied, 429 U.S. 875.

Although this Court has not directly considered the question of whether jury sentencing is a constitutional requirement, the Court's opinions contain unmistakable indications that no such mandate would be considered to be a part of the Constitution. In Proffit v. Florida, supra, the court upheld a Florida death penalty statute against a cruel and unusual punishment clause challenge. The Florida statute provided for judicial sentencing rather than jury sentencing, and the plurality opinion pointed out that judicial sentencing had an even greater potential for consistency in the imposition of capital punishment and jury sentencing. See also, Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d 1134 (1983).

In Dobbert v. Florida, 423 U.S. 282 (1977), rehearing denied, 434 U.S. 882 (1977), the Court reviewed a case in which the trial judge overruled the jury's recommendation for a life sentence and sentenced the defendant to death. The Florida statute was upheld in Dobbert. Although the Court was concerned with whether the statute violated the ex post facto clause, it seems significant that the Court found, in the process of determining that the statute was ameliorative and thus not violative of the ex post facto clause, that defendants sentenced under the new statute were not significantly disadvantaged because, pursuant to it, "unlike the old statute, a jury determination of death is not binding. Under the new statute defendants have a second

chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court." 432 U.S. at 296. It seem unlikely that this Court, having once found a judicial sentencing statute constitutional because it was less onerous than a jury sentencing statute, would now be prepared to hold that evolving standards of decency demand jury sentencing.

The constitutionality of Florida's sentencing procedure has received extensive attention from the Florida Supreme Court and from this Court. In Washington v. State, 362 So.2d 658 (Fla. 1977), cert. den. 441 U.S. 937 (1979), the Florida Supreme Court, in a per curiam opinion, upheld a judicially imposed death sentence where the defendant had waived the right to jury input in the sentencing phase of the proceeding. The court rejected various attacks on the interpretation of certain statutory aggravating and mitigating factors.

Florida's Supreme Court has, on at least six occasions, upheld judicial imposition of the death penalty even though the jury had recommended life imprisonment. Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. den., 429 U.S. 873 (1976); Gardner v. State, 313 So.2d 675 (Fla. 1975), reversed on other grounds 430 U.S. 379 (1977); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, supra; Barclay v. State, 343 So.2d 1266 (Fla. 1977), reversed on other grounds 362 So.2d 657 (Fla.), cert. den., 439 U.S. 892

(1978); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den., 439 U.S. 920.

One other sign of this Court's disinclination to consider jury sentencing a constitutional mandate appears in Justice Rehnquist's opinion as a circuit justice in Richmond v. Arizona, 434 U.S. 1323 (1977), rehearing denied, 434 U.S. 976 (1977), in which he ruled that a criminal defendant had no constitutional right to have a jury find facts in aggravation or mitigation of punishment and remarked that "such jury input would not appear to be required under this court's decision in Proffit [v. Florida], supra, 434 U.S. at 1325."

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 7th day of May, 1984.

Respectfully submitted,

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No. 83-6326

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CERTIFICATE OF MAILING

I, LYNN E. THOMAS, counsel of record for respondent, The State of Idaho, do state under oath, pursuant to Rule 28.2, that the original of the accompanying respondent's MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO was placed in the United States mail on May 7, 1984, first class postage affixed, at Boise, Idaho, addressed to:

Alexander Stevas
Clerk of the Court
U. S. Supreme Court
Washington, DC 20543

LYNN E. THOMAS

SUBSCRIBED AND SWORN TO before me this 7th day of May, 1984.

Notary Public for Idaho
Residing at Boise

CERTIFICATE OF MAILING

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of May, 1984, served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO, by placing same in the United States mail, first class postage prepaid, addressed to Mr. Rolf M. Kehne, Office of Ada County Public Defender, 303 West Bannock Street, Boise, Idaho 83702, counsel of record for petitioner.

LYNN E. THOMAS
Solicitor General
State of Idaho

CERTIFICATE OF SERVICE